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ARTICLE

TIES THAT MAY BIND: ANTITRUST LIABILITY FOR EXCLUSIVE HOSPITAL-PHYSICIAN CONTRACTS AFTER JEFFERSON PARISH HOSPITAL DISTRICT v. HYDE

David W. Clark

1983 MISSISSIPPI SUPREME COURT REVIEW

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TABLE OF CONTENTS

ARTICLE

Ties That May Bind: Antitrust Liability for Exclusive Hospital-Physician Contracts After Jefferson Parish Hospital District v. Hyde ..... *David W. Clark* 1

1983 MISSISSIPPI SUPREME COURT REVIEW

Administrative Law 45

Civil Procedure 73

Contracts & Commercial Law 97

Criminal Law 117

Miscellaneous 143

Property 157

Torts 167

RECENT DECISIONS

Commercial Law—Implied Warranty of Merchantability—Sale of Goods by Farmer May Give Rise to Implied Warranty of Merchantability (*Vince v. Broome*, Miss. 1983) 175

Torts—Defamation—Retreat into Private Life Does Not Remove Plaintiff's 'Public Figure' Status with Regard to Statements About Past Public Conduct (*Newson v. Henry*, Miss. 1983) 189

Taxation—Computation of Gain or Loss—The Amount Realized from the Disposition of Encumbered Property Includes Nonrecourse Obligations Regardless of the Fair Market Value of the Property (*Commissioner v. Tufts*, U.S. 1983) 207

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TIES THAT MAY BIND: ANTITRUST LIABILITY FOR EXCLUSIVE HOSPITAL-PHYSICIAN CONTRACTS AFTER JEFFERSON PARISH HOSPITAL DISTRICT v. HYDE

*David W. Clark**

I. Introduction

Exclusive agreements between hospitals and physicians or physician groups are anything but unusual. Under such arrangements the only physicians who may perform certain specialty work at a hospital are the physicians who are under contract with the hospital. These arrangements are especially prevalent with physicians in the hospital-based specialties, *i.e.*, radiology, pathology and anesthesiology, but they are also common with other medical specialties, such as cardiac surgery, cardiac catheterization, renal dialysis and emergency room services. A survey by the American Medical Association found that as recently as 1981, approximately 78,600 physicians, or 26% of all patient-care physicians, excluding residents and federal employees, had contractual arrangements with hospitals. Seventy-eight percent of the 8,500 pathologists, 58% of the 15,800 radiologists, 27% of the 13,100 anesthesiologists, and 11% of the surgeons had such arrangements. The percentage of total annual income derived from such arrangements by physicians in the three hospital-based specialties is even more significant: 96% for pathologists, 80% for radiologists and 87% for anesthesiologists.[1]

The figures are much the same from the hospital side. For example, in 1972-74 approximately 60% of the country's hospi-

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* Member, Wise Carter Child and Caraway, Jackson, Mississippi. B.A., 1970, Millsaps College; M.A., 1971, Harvard University; J.D., 1974, University of Michigan.

[1] *Physicians' Financial Arrangements With Hospitals*, Am. Med. A. Center for Health Pol'y Research Socioeconomic Monitoring Sys. Rep., Feb. 1982, at 1-4.

tals had either salaried pathologists or compensated pathologists under contract based on a percentage of the hospital's pathology department income. In the case of radiologists, 6% to 10% were salaried employees and 55% to 62% were compensated by percentage of department income.[2] While some of these hospital-physician contracts may not be exclusive, other physicians doubtless have non-contractual arrangements which are exclusive in fact, so these figures are a very good indication that exclusive agreements, at least with hospital-based physicians, have been the rule, not the exception.

Exclusive arrangements with physicians may have numerous advantages for hospitals, but they can also have a dramatic effect on the access to patients, and on the income, of those physicians whom they exclude. This is again especially true of anesthesiologists, pathologists, radiologists, and other hospital-based specialists. If the exclusive agreement has the effect of denying access to the facilities needed to serve patients, the excluded specialist may not, depending on the available alternatives, have any way to market his or her services. In effect, he may become a pilot without access to an airplane, a skipper without a boat.

Furthermore, while the hospital may have had quite legitimate reasons for wanting an exclusive contract and may unilaterally have made the decision to enter into the contract, there always may be the suspicion that the contracting physicians instigated the exclusive arrangement in order to eliminate competition from other practitioners in their specialty. And the pressures of competition — not just from other physicians but from "allied health professionals"[3] — will be increasing. In this country in the decades ahead there will be too many health professionals competing for a limited number of practice positions, especially in hospitals, and for an increasingly limited amount of reimbursement income. By 1990 there will be a surplus of as

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[2] P. Feldstein & C. Roehrig, An Analysis of Exclusive Contracts and Closed Staffing in Hospitals: The Effects on Competition, (report to the Federal Trade Commission).

[3] The term "allied health professionals" is commonly used to describe professionals such as audiologists, chiropractors, clinical psychologists, nurse anesthetists, nurse midwives, optometrists, pathology medical technologists, physical and occupational therapists, podiatrists, psychiatric social workers, respiratory therapists, and speech pathologists.

many as 63,000 physicians, and by the year 2000 the surplus will be about 137,000. By 1990 the supply of specialists will be about 190% of those needed for cardiology, 190% of those needed for neurosurgery, and 150% of those needed for general surgery.[4] At the same time the number of allied health professionals is increasing steadily. Also, the competition among professionals for access to hospital privileges and patients will be increasingly intense, as tough controls on certificates of need will restrict the growth of new hospital beds. Hospital privileges may become more difficult to acquire and hence more valuable. The government, insurance companies and employers have increased their efforts to limit health care costs by implementing strategies to tighten cost controls, limit certain benefits, and strengthen professional peer review. This has increased the competition among professional providers at all levels and has provided incentives for lower-cost and more efficient providers.[5]As one might expect, denials to physicians or other health professionals of access to a hospital or its patients have led to lawsuits. As the competition and number of competitors for this access increase, the pressures for resort to legal actions will increase as well. Traditionally, cases involving denial of physician access to a hospital or its patients revolved around the denial of medical staff privileges to the physician. Those actions generally included claims under the due process guarantees of the fifth and fourteenth amendments or under sections 1983 and 1985 of the Civil Rights Act.[6] Still other claims have been based upon common law tort theories such as interference with a business relationship, defamation, or

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[4] *See* Bowman, *Estimates of Physician Requirements for 1990,* J. AM. MED. A., Nov. 18, 1983, at 2623, 2624, 2626.

[5] *See* H. HALPER & J. MILES, ANTITRUST GUIDE FOR HEALTH CARE COALITIONS iii (1983); M. POLLARD & R. LEIBENLUFT, ANTITRUST AND THE HEALTH PROFESSIONS—POLICY PLANNING ISSUES PAPER 5-7, 11-13 (Federal Trade Comm'n July 1981).

[6] 42 U.S.C. §§ 1983, 1985 (Supp. V 1981). *See, e.g.,* Cardio-Medical Ass'n Ltd. v. Crozer-Chester Medical Center, 536 F. Supp. 1065, 1069 (E.D. Pa. 1982) (§ 1983 action claiming violation of property right without procedural due process required by fourteenth amendment), *rev'd,* 721 F.2d 68 (3d Cir. 1983); Modaber v. Culpepper Memorial Hosp., Inc., 674 F.2d 1023, 1024 (4th Cir. 1982) (same); Shaw v. Hospital Auth., 614 F.2d 946, 948 (5th Cir.) (procedural due process claim), *cert. denied,* 449 U.S. 955 (1980); Aasum v. Good Samaritan Hosp., 542 F.2d 792, 799 (9th Cir. 1976) (action based on § 1983 and fourteenth amendment).

breach of contract.[7]

In recent years physicians in these suits increasingly have added claims under the federal antitrust laws[8] or state antitrust statutes.[9] Until 1982 these antitrust challenges to hospitals' exclusive contracts were singularly unsuccessful. Then came the Fifth Circuit decision in *Hyde v. Jefferson Parish Hospital District No. 2*,[10] in which an exclusive arrangement between a hospital and an anesthesiology group was held to be unlawful tying, a *per se* violation of the antitrust laws.[11] The resulting uncertainty among hospitals, especially in Mississippi, Texas and Louisiana, was inevitable and understandable.

The Supreme Court decision in *Hyde*[12] reversing the Fifth Circuit may have removed some of the uncertainty, but should quiet little of the anxiety for hospitals or physicians who are parties to or are contemplating an exclusive arrangement. Exclusive arrangements in a hospital setting may still be tagged with the tying characterization, and the Supreme Court has unequivocally announced that unlawful tying is still a *per se* violation of

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[7] *See, e.g.*, Griffing v. Lucius O. Crosby Memorial Hosp., 1984-1 Trade Cas. (CCH) ¶ 65,854 (S.D. Miss. Jan. 31, 1984) (certain intentional torts and conspiracy to commit those torts alleged); Robinson v. Magovern, 521 F. Supp. 842, 925-27 (W.D. Pa. 1981) (thoracic surgeon claimed to be third-party beneficiary of medical staff bylaws which hospital failed to follow), *aff'd mem.*, 688 F.2d 824 (3d Cir. 1982).

[8] Section 1 of the Sherman Act makes unlawful "[e]very contract, combination . . . or conspiracy in restraint of trade." 15 U.S.C. § 1 (1982). Section 4 of the Clayton Act provides a private right of action for any person who is "injured in his business or property by reason of anything forbidden in the antitrust laws . . . .", 15 U.S.C. § 15 (1982), and section 16 of the Act permits injunctions against "threatened loss or damage by a violation of the antitrust laws . . . ." 15 U.S.C. § 26 (1982). Section 3 of the Clayton Act also prohibits exclusive dealing, tying, and other practices when their effect may be to substantially lessen competition. *See* 15 U.S.C. § 14 (1982).

[9] The state statutes usually track the federal law and are, in effect, "little Sherman Acts." *See, e.g.*, MISS. CODE ANN. §§ 75-21-1 to -39 (1972). The Mississippi statute was passed shortly after the Sherman Act, but does not have the treble damages remedy added to the federal law by the Clayton Act amendments. *Compare* 15 U.S.C. § 15 (1982) (allowing treble damages) *with* MISS. CODE ANN. § 75-21-9 (1972) (allowing proven damages and $500 penalty).

[10] 686 F.2d 286 (5th Cir. 1982).

[11] *Id.* at 289-92. For discussion of the *per se* characterization, *see infra* notes 45-49 and accompanying text.

[12] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 52 U.S.L.W. 4385 (U.S. March 17, 1984).

the antitrust laws.[13] At the same time, the Court has limited the range of settings in which this harsh conclusion will be reached, and has raised the threshold of proof over which an excluded professional must step on his way to securing relief.[14]

This article uses the Supreme Court and Fifth Circuit decisions in *Hyde* as prisms through which to separate and study the strengths and weaknesses of the tying characterization for exclusive arrangements in a health care setting. This article deals with the development of the law prior to *Hyde*, the significance of the *Hyde* opinions, the reasons for and problems with the courts' analyses, the features of *Hyde* which distinguish it from decisions dealing with similar situations, and the future of the judicial treatment of exclusive contracts in the hospital industry.

II. Antitrust and the Health Professions Prior to *Hyde*

Prior to 1975, there was some doubt whether the antitrust laws really applied to contractual or other restraints involving the "learned professions," even though the Supreme Court as long ago as 1943 had applied the antitrust laws to professional associations when their activities had a direct impact on a corporation or other business entity. In that year the Supreme Court held in *American Medical Association v. United States*[15] that the American Medical Association and the District of Columbia Medical Society had violated the Sherman Act by conspiring to block the operation of a prepaid medical plan.[16] The Court specifically left open, however, the question whether the Sherman Act applied to other aspects of a physician's practice of his profession.[17]

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[13] *Id.* at 4387.

[14] *See infra* notes 90-160 and accompanying text.

[15] 317 U.S. 519 (1943).

[16] *Id.* at 536.

[17] *Id.* at 528. "Much argument has been addressed to the question whether a physician's practice of his profession constitutes trade under § 3 of the Sherman Act. In light of what we shall say with respect to the charge laid in the indictment, we need not consider or decide this question." 317 U.S. at 528. The Sherman Act is limited to conduct involving "trade or commerce," *see* 15 U.S.C. §§ 1, 2 (1982), thus restricting the application of that Act to conduct which meets an interstate commerce jurisdictional test. In *American Medical Ass'n v. United States*, there was no interstate commerce defense available since the challenged conduct took place in the District of Columbia and

In 1952 the Supreme Court faced similar allegations of a physician boycott of prepaid group practices in *United States v. Oregon State Medical Society*.[18] Although the Court did not say whether an exception to the antitrust laws existed for the "learned professions," it observed in passing that ethical considerations are involved in the doctor-patient relationship and, therefore, that usual modes of business competition could be "demoralizing to the ethical standards of a profession."[19] This dictum, along with that from other decisions pre-dating *American Medical Association v. United States*,[20] effectively discouraged new antitrust challenges of arrangements involving professionals for two decades.

In 1974, the Fourth Circuit in *Goldfarb v. Virginia State Bar*[21] converted the *Oregon State Medical Society* dictum into a holding:

> We believe that much of the criticism of this 'learned profession' exemption is the result of a misunderstanding of its nature and extent. The exemption is not a personal immunity from prosecution, but is rather a recognition that the Sherman Act prohibits only those restraints which are upon trade or commerce. The occupation of one who violates the Sherman Act is irrelevant. If a group of doctors conspire to obstruct the interstate sale of health insurance their professional status would be no defense. On the other hand, if a group of doctors conspire to restrain the practice of another doctor there is no Sherman Act violation because that which is restrained (i.e., the practice of a learned profession, medicine) is neither trade nor commerce.[22]

This was the height of any real or imagined exemption from the antitrust laws for anti-competitive activities involving physicians

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could thus be attacked under § 3 of the Sherman Act, 15 U.S.C. § 3 (1982), which prohibts trusts or combinations in restraint of trade in United States territories or the District of Columbia. *See* 317 U.S. at 526.

[18] 343 U.S. 326 (1952).

[19] *Id.* at 336.

[20] *See* Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 436 (1932); Federal Trade Comm'n v. Raladam Co., 283 U.S. 643, 653 (1931); Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200, 209 (1922).

[21] 497 F.2d 1 (4th Cir. 1974), *rev'd*, 421 U.S. 773 (1975).

[22] 497 F.2d at 14-15.

or other professionals.

A unanimous Supreme Court reversed the Fourth Circuit, rejecting the defendant's claims for a broad professional exemption defense.[23] At issue in *Goldfarb* was the legality under the antitrust laws of a minimum fee schedule, established by a local bar association for real estate closings.[24] After determining that the setting of the schedule constituted price-fixing, the Court concluded that Congress meant the antitrust laws to be applied broadly: "The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act . . . nor is the public service aspect of professional practice controlling in determining whether § 1 [of the Sherman Act] includes professions."[25]

The Court hedged, however. Perhaps not being ready to discard the traditional notion that the professions are somehow different and should not be bothered by the more mundane features — and legal restrictions — of competition, the Supreme Court added its infamous footnote 17:

> The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the profession, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.[26]

While *Goldfarb* appeared to eliminate any possibility of a special exemption for the professions, including the health care professions, the dictum of footnote 17 held out hope to defenders of the status quo that some professional exemption defense to antitrust claims might be found. Footnote 17 became a favorite cita-

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[23] 421 U.S. 773, 793 (1975). Justice Powell took no part in the decision. *Id.*

[24] *Id.* at 775.

[25] *Id.* at 787.

[26] *Id.* at 788 n.17.

tion for those who were defending professionals.[27]

One professional group, the National Society of Professional Engineers, soon responded to the Court's implicit invitation and emphasized the "public service aspect" of the professional conduct challenged in a Sherman Act suit. In *National Society of Professional Engineers v. United States*,[28] the Court reviewed a section of the Society's Canon of Ethics that prohibited members from submitting competitive bids for engineering services. The organization emphasized the beneficial purposes of the canon, arguing that competition would pose a danger to the public health and safety by encouraging inferior engineering work, resulting in economical but dangerous buildings, bridges, and other structures.[29] In rejecting this proposed justification, the Supreme Court explained that the objective of the Sherman Act was to promote competition. Competition, in turn, would produce lower prices and higher quality goods or services.[30] The Court concluded that "[t]he Rule of Reason does not support a defense based upon the assumption that competition itself is unreasonable."[31]

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[27] *See, e.g.*, Smith v. Pro Football, Inc., 593 F.2d 1173, 1187 (D.C. Cir. 1978) (professional football association); Paralegal Inst., Inc. v. American Bar Ass'n, 475 F. Supp. 1123, 1129-30 (E.D.N.Y. 1979) (American Bar Association guidelines and accreditation program for paralegals); Feminist Women's Health Center, Inc. v. Mohammad, 415 F. Supp. 1258, 1262-63 (N.D. Fla. 1976) (physicians performing elective abortions boycotting women's health center). Indeed, the district court in *Hyde* relied upon footnote 17, saying the Supreme Court's intimation was that "the activities of professional groups should be analyzed according to the rule of reason even though the conduct might be considered a per se violation in another context." Hyde v. Jefferson Parish Hosp. Dist. No. 2, 513 F. Supp. 532, 543 (E.D. La. 1981), *rev'd*, 686 F.2d 286 (5th Cir. 1982). The Fifth Circuit disagreed, citing Arizona v. Maricopa County Medical Soc'y, 435 U.S. 679 (1978), as foreclosing the argument that professionals were exempt from the *per se* rule. 686 F.2d at 292-94. On appeal to the United States Supreme Court, the defendants sought no special exemptions for the professions. *See* Brief for the Petitioners at 4 n.3, Hyde v. Jefferson Parish Hosp. Dist. No. 2, 52 U.S.L.W. 4385 (U.S. March 17, 1984).

[28] 435 U.S. 679 (1978).

[29] *Id.* at 693-94.

[30] *Id.* at 692-93.

[31] *Id.* at 696. The Court said that the sole object of analysis in antitrust cases "is to form a judgment about the competitive significance of the restraint[,] not to decide whether a policy favoring competition is in the public interest, or in the interest of the member of an industry." *Id.* at 692. Creating an exception to the Sherman Act whenever a public safety rationale was offered "would be tantamount to a repeal of the statute." 435 U.S. at 695. For an explanation of the "Rule of Reason," see *infra* note 44 and ac-

Did the Court mean that health and safety considerations or motivations are irrelevant to antitrust analysis? On the one hand, the Court rather clearly rejected the suggestion that footnote 17 created a special exemption from antitrust liability. That footnote, according to the Court, "cannot be read as fashioning a broad exemption under the Rule of Reason for learned professions."[32] On the other hand, the Court continued to fuel the litigation fires by hinting that somehow, someday, somewhere there really might be an exemption for professional activities:

> We adhere to the view expressed in *Goldfarb* that, by their nature, professional services may differ significantly from other business services, and, accordingly, the nature of the competition in such services may vary. Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason.[33]

The health care industry and professions could still hold hope that while there was no general exemption for professional activities, there might be one for the health care professions. Health care *is* different. Is there any other industry in which the great majority of purchasers do not pay directly for the services they purchase? The significant role played by third-party payors, whether government or insurance companies or coalitions of employees, necessarily alters the nature and extent of incentives and competition.[34] Moreover, could the "public service aspect" of other professions possibly compare with that of the health care professions? The deference and esteem that traditionally have been accorded physicians, for example, together with the life-or-death matters with which those professionals deal, tend to make monetary concerns seem secondary. Surely the rules applied under the antitrust laws for health care must be different from those for lawyers, accountants and engineers?[35]

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companying text.

[32] 435 U.S. at 696.

[33] *Id.*

[34] Sims, *Maricopa: Are the Professions Different?*, 52 ANTITRUST L.J. 177, 180 (1983).

[35] Clearly, many lower courts have felt that the health care business indeed deserves

Then, in *Arizona v. Maricopa County Medical Society*,[36] the Supreme Court reviewed a Ninth Circuit ruling that health care was sufficiently different from other business activities that the *per se*[37] rule did not apply.[38] The Supreme Court disagreed, refusing to distinguish health care from other business endeavors. The Court rejected a special-treatment-for-professionals defense in finding that the setting of maximum fees was a *per se* violation of section 1 of the Sherman Act: "The price fixing agreements in this case . . . are not premised on public service or ethical norms. The respondents do not argue, as did the defendants in *Goldfarb* and *Professional Engineers*, that the quality of the professional service that their members provide is enhanced by the price restraint."[39]

Where did this leave those arguing for special treatment for the professions, and for health care in particular? Plainly, the health care professions were not exempt from the antitrust laws. But was there still some chance the Supreme Court might not apply the antitrust laws in the same manner to health care as to other businesses? Did it make any difference that *Maricopa* involved *price* restraints in a horizontal setting, always a favorite

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special treatment. The rationale for this special treatment has generally taken two forms: first, that courts have not had enough experience with antitrust analysis of the health care industry to employ a *per se* rule, *see, e.g.*, Arizona v. Maricopa County Medical Soc'y, 643 F.2d 553, 556 (9th Cir. 1980) (lack of knowledge about competitive impact on health care industry creates reluctance to employ *per se* rule), *rev'd*, 457 U.S. 332 (1982); second, that there is something about the public service or ethical considerations of the health care professions that makes ordinary "commercial" analysis inappropriate, *see, e.g.*, McElhinney v. Medical Protective Co., 549 F. Supp. 121, 132-33 (E.D. Ky. 1982) (alleged conspiracy to deny surgeon access to hospital and refuse to refer patients to him "noncommercial in nature"; was rather disciplinary proceeding with thin economic overlay). Some courts employ both forms. *See, e.g.* Smith v. Northern Mich. Hosps., Inc., 703 F.2d 942, 949 n.12 (6th Cir. 1983) (recognizing professionals not exempt, but stating effect on competition must be considered); Hyde v. Jefferson Parish Hosp. Dist. No. 2, 513 F. Supp. 532, 542, 544 (E.D. La. 1981) (anticompetitive effect must be established and must consider nature and purpose of health care profession), *rev'd*, 686 F.2d 286 (5th Cir. 1982).

[36] 457 U.S. 332 (1982).

[37] For a discussion of the *per se* rule, *see infra* notes 45-49 and accompanying text.

[38] 457 U.S. at 349.

[39] *Id.* The suggestion by the Court in this statement that enhancement of professional service might be a defense is somewhat puzzling, since the court rejected that defense in both *Goldfarb* and *Professional Engineers*. Sims, *supra* note 34, at 181.

target for the Court in applying the *per se* rule? What if exclusive contracts between physicians and hospitals were seen more as vertical arrangements linking two separate markets, rather than as horizontal ones restraining competition between or among competitors in the same market? Or what if the non-price aspects of the restraints predominated? After *Maricopa*, courts struggled with such questions in attempting to determine the proper framework in which to analyze exclusive arrangements between hospitals and physicians.[40]

The Supreme Court in *Hyde* answered the questions. The antitrust laws apply to the health care industry, including the medical profession, just as to any other business endeavor. In appropriate cases, even those involving non-price restraints, *per se* liability may attach.[41] But courts must not apply the *per se* rule blindly or indiscriminately, especially when there is little probability of a substantial, adverse and "obviously unreasonable" impact on competition.[42]

III. Antitrust Law and Exclusive Hospital-Physician Agreements: The Analytical Framework

The antitrust laws prohibit contracts or other agreements that unreasonably restrain trade. Since most if not all contracts or other agreements "restrain trade" in some respect, the judicial inquiry has been directed to determining when such restraints are "unreasonable."[43] The basic form of antitrust analysis is the "Rule of Reason," by which courts, in analyzing the challenged arrangement, weigh motive, intent, operation and consequences in determining whether the resulting restraint "merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy

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[40] *See, e.g.*, Konik v. Champlain Valley Physicians Hosp. Medical Center, 561 F. Supp. 700, 712-14 (N.D.N.Y. 1983); Pontius v. Children's Hosp., 552 F. Supp. 1352, 1367-70 (W.D. Pa. 1982); Everhart v. Jane C. Stormont Hosp., 1982-1 Trade Cas. (CCH) ¶ 64,703, at 73,897-98 (D. Kan. Feb. 18, 1982).

[41] *See* 52 U.S.L.W. at 4387, 4387 n.12.

[42] *Id.* at 4392-93.

[43] *See* Standard Oil Co. v. United States, 221 U.S. 1, 63-66 (1911) (Sherman Act's proscription of "every" contract, combination or conspiracy in restraint of trade among states prohibits only "unreasonable" restraints).

competition."[44]

This inquiry, however, may be both expensive and lengthy. Further, because rule of reason analysis often involves a virtual labyrinth of interrelated factors and elements, one case may offer little guidance concerning the legality of similar conduct in seemingly similar situations. These problems have led courts to apply a second type of analysis to certain classes of restraints with which they have dealt often enough to be reasonably certain that the conduct is almost certainly motivated by anti-competitive intent and will have anti-competitive effects. Once a restraint is found to belong to such a class, it is declared illegal *per se* and no inquiry into the actual purpose or effect of the arrangement, including the effect on competition, is required.[45] The Supreme Court has determined that such *per se* treatment, in one form or another, is appropriate for such classes of restraints as group boycotts, which also are called refusals to

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[44] Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918). The Supreme Court in that decision gave the classic statement of the rule of reason:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be obtained, are all relevant facts.

Id.

In evaluating market effects under the rule of reason, courts generally consider five factors:

1. The market area involved;
2. The nature of the particular industry, product, or service involved;
3. The nature of the alleged restraint and its effect, actual or probable;
4. The reasons for adopting the particular practice which is alleged to constitute the restraint; and
5. The condition of the business before and after the restraint was imposed.

Id.

[45] Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). In *Northern Pacific Railway* the Court summarized the reasons for finding certain conduct to be unreasonable *per se*:

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

Id.

deal,[46] horizontal price-fixing,[47] market divisions[48] and tying arrangements.[49]

After *Maricopa,* the health care industry and professions were faced not just with the prospect of subjection to claims under the antitrust laws, but with the very real possibility that certain arrangements which were common in the health care field might be seen as subject to the *per se* rule.[50] The application of that rule would preclude full consideration of a variety of possible defenses, such as that the arrangement actually enhanced competition on a different level or in a different market, promoted the quality of care, assured availability of service, promoted the public health or welfare, or was motivated by ethical, not monetary, concerns. For example, the Fifth Circuit in *Hyde,* once it had declared the arrangement in question to be tying — a *per se* offense — indicated that it did not need to consider such possible defenses other than a very limited "business justification" defense.[51]

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[46] *See* Klors, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959).

[47] *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940).

[48] *See* United States v. Topco Assocs., 405 U.S. 596, 608 (1972).

[49] *See* United States Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610, 619 (1977); Northern Pac. Ry. v. United States, 356 U.S. 1, 5-7 (1958); International Salt Co. v. United States, 332 U.S. 392, 396 (1947).

[50] The court in *Maricopa* dealt with the setting of maximum prices. *See* 457 U.S. at 335-36. Other commonplace practices which might be seen as giving rise to *per se* antitrust liability include certain denials of staff privileges, which might be seen as possible boycotts or refusals to deal, and exclusive staffing agreements, which might be seen as possible tying arrangements.

[51] 686 F.2d at 292. However, before deciding that a particular arrangement is a *per se* violation, courts typically analyze possible justifications for the challenged conduct. Sometimes courts, even the Supreme Court, examine potential justifications or defenses *after* concluding that the arrangement in question is *per se* illegal. *See, e.g., Maricopa,* 457 U.S. at 351-54; *Hyde,* 686 F.2d at 292.

In effect, courts have moderated the severity of the *per se* characterization by conducting this preliminary, or "threshold," inquiry into whether there are plausible procompetitive justifications for the arrangement. If satisfied that significant beneficial results may exist, and that the challenged restraints may be required to achieve those results, a court will not categorize the restraint as a *per se* violation, but will apply the more flexible rule of reason scrutiny. For a good analysis of the situations in which courts have tended to make such "threshold" inquiries, see M. POLLARD & R. LEIBENLUFT, ANTITRUST AND THE HEALTH PROFESSIONS—POLICY PLANNING ISSUES PAPER 31-46 (Federal Trade Comm'n July 1981).

Nevertheless, if the arrangement constitutes a more severe restraint than is necessary to achieve the beneficial result, the courts will return to the *per se* rule. *See, e.g.,*

Exclusive contracts between hospitals and physicians may be characterized in two ways for purposes of the antitrust laws—as exclusive dealing or as tying. The chosen characterization is extremely significant since it dictates whether the arrangement will be evaluated by a *per se* or rule of reason analysis, thus quite possibly dictating the legal result.

In an exclusive dealing arrangement a buyer agrees to deal with or obtain all of its requirements from only one seller or supplier. These arrangements foreclose a certain amount of competition in the market for the seller's product or service, but courts have recognized that there may be a variety of quite reasonable justifications warranting them. For example, General Motors may decide in a particular year to buy tires for its automobiles only from Goodyear. This decision could be based on considerations of quality, competitive bidding, or administrative convenience. General Motors may have chosen Goodyear this particular year in order to improve General Motors' competitive position in the market for automobiles, an entirely legitimate objective under the antitrust laws.

Moreover, if such an arrangement were prohibited, General Motors might simply integrate its operations forward into the tire manufacturing industry and make its own tires. Certainly the purpose of the antitrust laws was not to encourage such partial vertical integration of operations — and the resulting increased concentration of industry — by discouraging what seems like a perfectly reasonable business decision to deal, for a limited time, with only one seller or supplier.

Since the buyer in an exclusive dealing contract is ordinarily not itself selling the product that it is purchasing — except as a part of the resulting package, such as an automobile with tires — such exclusive arrangements are seen as strictly vertical ones. Exclusive dealing arrangements are seen as having less potential for misuse of market power than tying arrangements,[52] in which the tying product seller may use its power in one product mar-

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Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39, 47 (5th Cir. 1976). Regardless of the potentially beneficial results, if the conduct is of a type that traditionally has been deemed a *per se* violation, most notably horizontal agreements affecting price, a defendant will face an uphill battle in avoiding the *per se* characterization.

[52] 2 E. KINTNER, FEDERAL ANTITRUST LAW § 10.52 (1980).

ket to profit and affect competitive conditions in a different product market.[53] Because of this diminished potential for abuse of power in a particular product market, courts have responded less harshly to exclusive dealing arrangements than to tying arrangements.[54] Courts are more willing to consider the possible justifications for the exclusive arrangement and will examine the purpose for the arrangement and its actual effects on competition. In short, courts evaluate such arrangements by a rule of reason analysis.[55]

Tying arrangements, on the other hand, have not been seen as having the same potential for redeeming justification. In a tying arrangement, the seller of a product or service in one product market will sell his product or service to a buyer only if the buyer agrees to purchase a second, distinct product or service as well.[56] Courts have prohibited tying on the ground that a seller should not be able to use power enjoyed in one product or service market to advance his position in a quite distinct product market on a basis other than the competitive merits of both products.[57] Unlawful tying is said to have no purpose or effect other than such unfair intrusion into, and unfair profit and competition in, the second market.[58] Although certain commentators have questioned this presumption of harm to competition,[59] courts consistently have found tying to be so offensive to the values underlying the antitrust laws that unlawful tying has been held to be a *per se* violation of section 1 of the Sherman Act.[60]

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[53] *See infra* notes 56-60 and accompanying text for a discussion of tying arrangements.

[54] KINTNER, *supra* note 52, at § 10.75. *See also* Standard Oil Co. v. United States, 337 U.S. 293, 306-07 (1949); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 163 (1977).

[55] KINTNER, *supra* note 52, at § 10.75. Exclusive dealing contracts may have beneficial competive effects, such as reducing selling expenses and increasing efficiency. *Id. See also* Standard Oil Co. v. United States, 337 U.S. 293, 306-07 (1949).

[56] 3 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 733a (1978); SULLIVAN, *supra* note 54, at § 150.

[57] Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

[58] *See* Standard Oil Co. v. United States, 337 U.S. 293, 305-06 (1949).

[59] *See, e.g.*, BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 365-81; *see infra* notes 75-80 and accompanying text.

[60] SULLIVAN, *supra* note 54, at § 156. *See also* Northern Pac. Ry. v. United States,

Prior to the Fifth Circuit's decision in *Hyde*, every federal court that had been faced with an antitrust challenge to a physician-hospital exclusive contract had treated the arrangement as exclusive dealing and had sustained the legality of the arrangement under a rule of reason analysis.[61] Likewise, every state court that had encountered similar claims under state antitrust laws also had sustained the hospitals' practices.[62] Even the Federal Trade Commission, subsequent to the Fifth Circuit decision in *Hyde*, indicated that it felt such exclusive arrangements should be analyzed under the rule of reason.[63]

For example, in *Dos Santos v. Columbus - Cuneo - Cabrini Medical Center*,[64] the Seventh Circuit dealt with an exclusive arrangement for anesthesiology services similar to that in *Hyde*, but treated the arrangement as a vertical one and analyzed it under the rule of reason.[65] The court suggested that on remand the district court should consider the potentially pro-competitive benefits of the contract, and posed the question whether the

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356 U.S. 1, 5-7 (1958) (tying arrangements always illegal if party has "sufficient economic power with respect to the tying product to appreciably restrain free competition").

[61] *See, e.g.*, Dos Santos v. Columbus-Cuneo-Cabrini Medical Center, 684 F.2d 1346, 1352 (7th Cir. 1982); Capili v. Shott, 620 F.2d 438, 439 (4th Cir. 1980); Harron v. United Hosp. Center, Inc., 522 F.2d 1133, 1134 (4th Cir. 1975), *cert. denied*, 424 U.S. 916 (1976); Robinson v. Magovern, 521 F. Supp. 842, 915 (W.D. Pa. 1981), *aff'd mem.*, 688 F.2d 824 (3d Cir. 1982).

[62] *See, e.g.*, Dattilo v. Tucson Gen. Hosp., 23 Ariz. App. 392, 533 P.2d 700, 703 (1975); Centeno v. Roseville Community Hosp., 107 Cal. App. 3d 62, 167 Cal. Rptr. 183, 186-87 (1979); Letsch v. Northern San Diego County Hosp. Dist., 248 Cal. App. 2d 52, 55 Cal. Rptr. 118, 121 (1966); Blank v. Palo Alto-Stanford Hosp. Center, 234 Cal. App. 2d 377, 44 Cal. Rptr. 572, 577 (1965); Rumple v. Bloomington Hosp., 422 N.E.2d 1309, 1318-19 (Ind. Ct. App. 1981).

[63] Advisory opinion letter from the Acting Secretary of the Federal Trade Commission, Benjamin I. Berman, to Robert E. Nord, 101 F.T.C. 991 (1983). This letter was in response to a request for an advisory opinion concerning the legality of an exclusive contract between a hospital and a radiology group. The FTC found several facts significant: the contract was limited to three years and was terminable by either party on six months' notice; the hospital unilaterally made the decision to enter into the contract; there were at least three other competing hospitals in the area; and radiology could be practiced on an outpatient basis to some extent. The FTC, along with the Antitrust Division of the Justice Department, also filed *amici curiae* briefs in the Supreme Court in *Hyde*, urging reversal of the Fifth Circuit decision. *See* Brief for the United States as Amicus Curiae, Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 52 U.S.L.W. 4385 (U.S. March 17, 1984).

[64] 684 F.2d 1346 (7th Cir. 1982).

[65] *Id.* at 1352.

hospital, rather than the patient, is the true buyer of anesthesia services.[66] Recently, the Sixth Circuit also held that an exclusive contract between a hospital and a group of physicians staffing the hospital's emergency room was a vertical relationship to be judged by the rule of reason. That court, in *Smith v. Northern Michigan Hospitals, Inc.*[67] also saw the hospital as competing in a different market from the physicians and, as the supplier and coordinator of an essential but limited public service, standing in a vertical relationship to both the plaintiff physicians and the contract physicians.[68]

However, the Supreme Court in *Hyde* removed all doubt that hospital-physician tying as a *per se* offense is quite alive, although its health and longevity[69] may be open to question. The majority rejected arguments by the hospital and by four concurring justices that the tying rule made no economic sense, that tying was not really against public policy, and that in any event it certainly should not be subjected to a *per se* rule.[70] The majority in *Hyde* asserted that "it is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se.' "[71] The Court then found that the exclusive agreement between the hospital and the anesthesiology group did constitute a tying arrangement and that such an arrangement, if it met the "thresh-

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[66] *Id.* at 1354. On remand, the district court found that the hospital was the buyer, that the market in which the hospital could shop for such services stretched across the country, and that the exclusive contract did not have a substantial adverse effect on competition or foreclose competition in the relevant market. Dos Santos v. Columbus-Cuneo-Cabrini Medical Center, No. 81-C-4296, slip op. at 7 (N.D. Ill. Oct. 25, 1983). For a more complete discussion of this aspect of *Dos Santos*, see *infra* note 82.

[67] 703 F.2d 942 (6th Cir. 1983).

[68] *Id.* at 953-54. The court found that the hospital was the "coordinator and supplier of an essential but limited public service," and therefore, was obliged "to staff its limited facilities in the manner which best serves the public interest." *Id.* at 953.

[69] The Court split 5-4 on whether tying should remain a *per se* offense or should instead be subjected to a rule of reason (or even less vigorous) analysis. Three Justices of the 5-member majority—Brennan, White, and Marshall—are among those with the longest service on the Court.

[70] *See* 52 U.S.L.W. at 4387-89; *id.* at 4393-96 (O'Connor, J., concurring); *see also* BORK, *supra* note 59, at 365-81.

[71] 52 U.S.L.W. at 4387.

old" and other requirements of an unlawful tie-in, would be illegal per se.[72]

The concurring opinion by Justice O'Connor, in which the Chief Justice and two others joined, deserves special comment here — not just for what it portends for the rule against tying, but also for its judicial activism and its attempt to rewrite judicial and legislative history.

A key element of the position mapped out in the concurrence — that tying should be evaluated by the rule of reason, if at all — is that tying poses no danger to society except when there is a substantial threat that the tying product's seller threatens by the use of the tie to drive other sellers out of the tied product market or unless the tying arrangement is likely to erect significant barriers to other sellers' entry into the tied product market.[73] Indeed, this is presented as an existing "threshold" requirement for tying.[74]

The first problem with this approach is that it overlooks the goals of the antitrust laws, as reflected in both legislative history and decades of judicial interpretation. It may be true, as Justice O'Connor contends, that a seller generally can exact but one monopoly profit, whether or not it ties the sale of a second product to its unique or monopolized product.[75] But that does not mean that preservation of competition or other legislative goals are unharmed by a tie, regardless of whether other sellers of the tied product are driven completely out of business or are otherwise barred from the tied product market.

Cognizable harm may result from other effects of a tie — impairment of the consumer's freedom to choose the best bargain in one market as a result of the need to purchase the tied product in another; protection of an inferior tied product from competitive pressures; ability of the tied product seller to take business from sellers in another market on a basis other than product merit; ability of the seller to use a tie to discriminate in price among purchasers. The legislative history and the judicial

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[72] *Id.* at 4391.

[73] *See id.* at 4394-95.

[74] *Id.* at 4395.

[75] *Id.* at 1394 (O'Connor, J., concurring).

interpretation of our antitrust laws support the protection of this freedom of competition and economic opportunity.[76]

Justice O'Connor's concurrence repeats some of the arguments of the economists and antitrust commentators known collectively as the "Chicago School."[77] The view of the Chicago School is basically that the only goal of the antitrust laws is to promote "economic efficiency," and that this goal is best reached by a laissez-faire, hands-off economic policy, particularly in judicial interpretation of the law in the economic area.[78] With regard to the status of tying as an antitrust offense, Robert Bork and others of this school argue that the courts have failed really to analyze the economic rationale for outlawing tying, particularly as regards the supposed transfer, or "leveraging," of market power from one product to another. Under this view, if a seller has sufficient market power to force buyers to take a second product, that seller in most cases could as easily extract its "monopoly profit" by raising the price of the first product. There is thus no "deadweight loss" or "efficiency loss" to the economy.[79] In fact, at least one Chicago School member argues that society should often encourage tying, because by providing a more accurate means of price discrimination the tie may increase the monopolists' output.[80]

The *Hyde* majority answered the Chicago School proponents by noting that the law has drawn a distinction between a seller's exploiting its market power by merely raising the price of the tying product, on the one hand, and that seller's attempting to impose restraints on competition in the tied product market, on the other. The former, the use of power to maximize return in a market when the seller already "enjoys some justifiable ad-

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[76] *See* 52 U.S.L.W. at 4387-88, 4387 n.15; United States Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610, 619-21 (1977); Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 512-14 (1969) (White, J., dissenting); Northern Pac. R. Co. v. United States, 356 U.S. 1, 5 (1958); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 608-09 (1953); *see also* Axinn, *A Lawyer's Response*, 52 ANTITRUST L.J. 643, 644-46 (1984); Spivack, *The Chicago School Approach to Firm Exercises of Monopoly Power: A Response*, 52 ANTITRUST L.J. 651, 664-65 (1984).

[77] Spivack, *supra* note 76, at 651-52.

[78] *Id.*

[78] *Id.* at 663-69.

[80] *See* BORK, supra note 59, at 375-78.

vantage over its competitors," does not necessarily compromise the objectives of the Sherman Act.[61] The latter presents the possibility of a variety of social and economic costs, including impairing the consumer's "freedom to select the best bargain in the second market."[62]

Another social or economic cost sometimes generated by tying may be present, particularly in a hospital-physician arrangement. Although a hospital may have significant market power, it may, because of reimbursement limits or other restrictions set by third-party payors such as insurance companies or govern-

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[61] 52 U.S.L.W. at 4388.

[62] *Id.* at 4388-89. If a hospital-physician arrangement does not meet the tests set forth in *Hyde* for tying, the arrangement may still be subject to antitrust liability as exclusive dealing, subject to analysis under the rule of reason. *See id.* at 4392-93. But satisfying the requirements for liability under this analysis will be quite different from satisfying those of a *per se* analysis, and ordinarily much more difficult.

If the exclusive arrangement is seen only as exclusive dealing, the excluded physician must show, among other things, the actual detrimental effect of the arrangement on competition among physicians in his or her specialty. One aspect of this competition may be the competition for exclusive contracts with hospitals. *Id.* at 4292. Moreover, the market in which the effect of the arrangement on competition will be measured may be substantially different from the relevant markets in the tying case.

For example, this market is discussed in *Dos Santos*, in which the Seventh Circuit reversed the district court's enjoining enforcement of an exclusive contract. The court of appeals was of the opinion that the *hospital*, which assembles a package of services for sale to the public, should be seen as the purchaser "in view of the hospital's responsibility for assuring the availability of anesthesia services for its patient, its incentive to regulate the use of its surgical facilities and its potential liability for negligent rendition of anesthesia services in its operating room." 684 F.2d at 1354.

This characterization of the hospital as purchaser may yield a greatly expanded relevant market — the market in which anesthesiologists compete — one in which it could be exceedingly difficult for a hospital to restrain competition appreciably. Upon remand, the district court in *Dos Santos* found that the relevant market for anesthesiologists was effectively a national market. The defendant hospital had conducted a search both across the nation and outside the United States for a chairman of anesthesiology. The defendant, a Chicago hospital, eventually recruited an anesthesiologist from Connecticut. The court found that in searching for such alternative providers of anesthesia services, the hospital was operating in a national market and was competing with numerous hospitals across the country. Dos Santos v. Columbus-Cuneo-Cabrini Medical Center, No. 81-C:4296, slip op. at 7 (N.D. Ill. Oct. 25, 1983). The Supreme Court opinion in *Hyde* did not specifically address the issue of the appropriate geographic market in which to evaluate the hospital-physician contract, other than noting that it might be "statewide or merely local." 52 U.S.L.W. at 4392. As the *Dos Santos* case demonstrates, an excluded professional's prospects of proving non-tying antitrust liability when required to show an appreciable restraint of trade in a regional or national market cannot be encouraging. Tying may remain, in many cases, the theory of choice.

ment programs, be unable to obtain its full monopoly profit. A hospital might use a tying arrangement similar to that in *Hyde* to obtain from the tied product the portion of this monopoly profit that third-party restrictions prevent it from realizing from the tying product.[83]

The Supreme Court opinion in *Hyde* left tying a *per se* violation, but a *per se* violation which will be more difficult to prove. *Hyde* also affirmed that a doctor-hospital contract might be treated as tying in an appropriate situation, but it severely restricted the range of situations in which such treatment will be appropriate. This narrowing of the focus of the tying rule was accomplished primarily through refinements in the analytical scheme used to determine if a particular arrangement constitutes tying. The next section will examine the specifics of the factual situation in *Hyde*, the analyses employed by the Fifth Circuit and the Supreme Court, and the significance of these analyses for hospital-physician contracts and tying in general.

IV. Hyde and Hospital-Physician Tying

Under the terms of the contract at issue in *Hyde*, the anesthesiology group was to provide all anesthesia services in the hospital. No other anesthesiologist could practice in the hospital's operating rooms.[84] An anesthesiologist from the group would supervise the hospital's nurse anesthetists in providing anesthesia services in each of the hospital's thirteen operating rooms. The anesthesiologist would determine the fee in each case, based upon an anesthesiologist's providing anesthesia services for an operation of the same complexity and length as the one performed. The hospital then billed the patients jointly for the anesthesia services provided by the physician and those provided by the hospital. After deducting from the gross receipts a specified percentage for write-offs, the hospital and the anesthe-

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[83] *See* 52 U.S.L.W. at 4392 n.47.

[84] 686 F.2d at 287 n.1. The original contract explicitly granted an exclusive right to provide anesthesia services. Although this exclusive language was deleted when the parties entered into a second contract five years later, the executive director of the hospital testified that another provision in the contract had the same effect as the deleted provision. *Id.*

siology group split the remainder.[85]

The plaintiff was a board-certified anesthesiologist whose application for admission to the hospital medical staff received a favorable recommendation from both the Credentials Committee and the Medical Staff Executive Committee. Based upon the contract, however, the hospital board voted to deny Dr. Hyde staff privileges.[86] Dr. Hyde then filed suit, claiming that the exclusive contract between the defendant hospital and defendant anesthesiology group constituted unlawful tying and excluded him from practice at the hospital. He also claimed that patients who used the hospital's operating rooms — the tying product — had no choice but to use the services of the contract anesthesiologists.[87]

The district court characterized the arrangement as tying but, relying in part on its reading of footnote 17 of *Goldfarb*, rejected a *per se* treatment in favor of a rule of reason analysis because the plaintiff had not demonstrated that the hospital "dominated" the market for its services.[88] Finally, the district court held that plaintiff was not entitled to relief under a rule of reason analysis because the closed group policy had few anticompetitive effects, and those it had were far outweighed by the benefits to patient care. The benefits the hospital claimed for the exclusive arrangement related to quality of patient care. By turning the operation of anesthesia services over to one group under contract, the hospital posited that the monitoring of specialized equipment and supervision of nurses could be handled better, the hospital was assured the twenty-four hour coverage that was crucial in the event of an emergency, and the use of the hospital's operating rooms was facilitated since it was not necessary to wait for an outside anesthesiologist. In addition, the responsibility for development and management of the department could be placed upon one entity with legal obligations to the hospital, and the hospital could more closely monitor the

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[85] *Id.* at 287-88.

[86] *Id.* at 287.

[87] *Id.* at 289. The Fifth Circuit pointed out that in fact the hospital had never seriously contested that the contract was a tying arrangement. *Id.*

[88] *Id.* at 288.

professional standards employed by the department members.[89]

The Fifth Circuit also found that the arrangement in *Hyde* constituted tying, but rejected the claimed justifications for the exclusive contract. That court also found that there were market imperfections in the health care industry which gave the defendant hospital the requisite market power, and, following the recent decision in *Maricopa,* held that the *per se* rule applied to agreements with professionals in the health care industry. On this basis, the court reversed the district court's dismissal of the plaintiff's claim.[90]

The Supreme Court, of course, reversed the Fifth Circuit, and, as developed below, made some significant statements in the process. The Fifth Circuit opinion still has lessons of its own, however, particularly for hospital counsel. In both opinions, the critical factors are the analytical scheme used to determine if a particular arrangement constitutes unlawful tying and the particular facts that influenced each court's application of the analytical scheme.

Four explicit characteristics of unlawful tying arrangements are generally recognized by courts:

> (1) two separate products, the tying product and the tied product;
> (2) sufficient market power in the tying product market to coerce purchase of the tied product;
> (3) involvement of a not insubstantial amount of interstate commerce in the tied market; and
> (4) anticompetitive effects in the tied market.[91]

A fifth characteristic also has been recognized as implicit in unlawful tying arrangements: competition by the seller of the tying product in the market for the tied product, either by selling the tied product itself or through an entity in which it has an interest, or by receiving direct profits or rebates from another's sale of the tied product.[92]

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[89] *Id.*

[90] *Id.* at 294-95.

[91] 686 F.2d at 289 (citing Bob Maxfield, Inc. v. American Motors Corp., 637 F.2d 1033, 1037 (5th Cir. 1981)).

[92] *See* Keener v. Sizzler Family Steak Houses, 597 F.2d 453, 456 (5th Cir. 1979); *see*

Justice O'Connor's concurrence in *Hyde* again deserves special comment, this time for its imaginative use of precedent in setting forth the requirements for an unlawful tying arrangement. The four concurring Justices' statement of one "requirement" of an unlawful tie simply misstates prior decisions of the Court. The concurring Justices contend that for there to be an unlawful tie, "there must be a substantial threat that the tying seller will acquire market power in the tied-product market."[93] The concurrence then proceeds to cite five Supreme Court antitrust decisions, none of which explicitly states or, it appears, implicitly supports such a requirement.[94] For now this "tied product market power" requirement is nothing more than a contention in a concurrence, but given the bare 5-4 margin of decision in *Hyde* — and four Justices' apparent willingness to elevate an economic theory over congressional intent and judicial experience — it could soon be the law.

Of the recognized factors in the tying analysis, the most significant for the future, as seen through the *Hyde* opinions, are participation in the tied product market, the existence of two separate products, and sufficient market power.[95]

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also Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821, 834-35 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979); Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1216 (9th Cir. 1977).

[93] 52 U.S.L.W. at 4395.

[94] *See id.* The cases cited were United States Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610, 617-18 (1977); Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 498-99 (1969); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 611 (1953); Standard Oil Co. v. United States, 337 U.S. 293, 305-06 (1949); and International Salt Co. v. United States, 332 U.S. 392, 396 (1947).

[95] The third requirement, involvement of a not insubstantial amount of interstate commerce, has not been as critical to the disposition of recent reported cases. In two recent decisions, the Supreme Court addressed this jurisdictional issue, found the requisite effect on interstate commerce, reiterated that wholly local activities may have the required effect on interstate commerce, and raised more questions than it answered regarding whether a plaintiff must show that the alleged anticompetitive activity itself would substantially affect interstate commerce, or just that the defendant's general business operations affect such commerce. *See* McLain v. Real Estate Bd., 444 U.S. 232, 246 (1980); Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 743-44 (1976); *see also* Cardio-Medical Assocs., Ltd., v. Crozer-Chester Medical Center, 721 F.2d 68, 76 (3d Cir. 1983) (fact that 12-15% of patients anti-competitive conduct allegedly kept away would have come from out of state is sufficient effect on interstate commerce).

The fourth requirement, anticompetitive effects in the tied market, is a fact-sensitive determination which will be made on a case-by-case basis. The Fifth Circuit in *Hyde*

A. *Participation in the Tied Product Market*

Participation or competition by the seller of the tying product in the market for the tied product, whether by selling the tied product itself or by otherwise receiving profits, rebates or commissions from the sale of the tied product, is perhaps the least discussed element of the tying offense.[96] The presence of this element in *Hyde* distinguishes that decision from many exclusive arrangements with hospitals, and helps explain why the Fifth Circuit found it so easy to label the arrangement tying.

The rationale for prohibiting tying is that a seller should not be able to use power which it enjoys in one product (or service) market to advance its position in a quite distinct product market on a basis other than the competitive merits of both products. Unlawful tying is made a *per se* offense because it is said to have no purpose or effect other than such unfair intrusion into and unfair profit in the second market.[97] Absent this participation for profit in the second market, this use of power in one market to profit in another, the justification for the tying proscription vanishes.[98]

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found, *inter alia*, that the quality of care was lowered by the exclusive agreement, although the court based this finding simply on the hospital's hiring "nurse anesthetists in place of needed anesthesiologists." 686 F.2d at 292.

By contrast, the Seventh Circuit in *Dos Santos* cited with obvious approval the finding of the district court in *Hyde* that a closed department system "would serve to encourage anesthesiologists to improve the quality of their services in order to obtain . . . contracts with hospitals." 684 F.2d at 1354 (quoting 513 F. Supp. at 141). *See also* Robinson v. Magovern, 521 F. Supp. 842, 919 (W.D. Pa. 1981)(closed department system may improve quality of health care by promoting competition), *aff'd mem.*, 688 F.2d 824 (3d Cir. 1982).

[96] *See* Keener v. Sizzler Family Steak Houses, 597 F.2d 453, 456 (5th Cir. 1979); Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821, 834-35 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979); Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1216 (9th Cir. 1977); Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368, 377 n.9 (5th Cir. 1977); Venzie Corp. v. United States Mineral Prod. Co., 521 F.2d 1309, 1317-18 (3d Cir. 1975); Crawford Transp. Co. v. Chrysler Corp., 338 F.2d 934, 938-39 (6th Cir. 1964), *cert. denied*, 380 U.S. 954 (1965); Griffing v. Lucius O. Crosby Memorial Hosp., 1984-1 Trade Cas. (CCH) ¶ 65,854 (S.D. Miss. Jan. 31, 1984); *see also* Yentsch v. Texaco, Inc., 630 F.2d 46, 57 n.15 (2d Cir. 1980).

[97] *See* SULLIVAN, *supra* note 54, at § 156. *But cf.* BORK, *supra* note 59, at 375-81.

[98] "The absence of a direct interest in the tied product market leaves open the possibility of a nonpredatory justification [for requiring sales through a particular company] and distinguishes this situation from the solely anti-competitive arrangements which

parties decide to enter into a contract, any time two sellers' products are sold as a package, one may presume there is some benefit or expectation of benefit to both parties. But this does not make the arrangement unlawful; this does not draw the contracting parties within the rationale for the tying rule; this does not justify arrest of the usual suspects.

The defendant hospital in *Hyde* was receiving such a "profit" from the sale of anesthesia services and was competing for profit in the same market as anesthesiologists, including Dr. Hyde, the market for sale of professional anesthesia services.

As noted previously, the members of the anesthesiology group determined the fee for each anesthesiological procedure performed at the hospital as though an anesthesiologist had provided the services. In fact, most of the services upon which the anesthesiologists based their fee were actually performed by hospital employees, the nurse anesthetists. The Fifth Circuit noted that the defendant hospital in reality was contracting with a small group of anesthesiologists and letting those physicians supervise a larger group of lower-priced anesthetists, but billing the patients the higher fee which an anesthesiologist would have charged if he or she, rather than the hospital's anesthetist, had provided all of the professional services. Since the hospital and the anesthesiology group billed jointly and split the fees evenly after deductions, this led to the hospital's realizing a substantial profit from the sale of the tied product, anesthesia services.[100]

This element in the *Hyde* case appears particularly to have upset the Fifth Circuit:

> While it is true that the tying of anesthesia services to operating rooms in the instant case did not lead to a higher charge for anesthesia services, it accomplished just as dramatic an effect by increasing the hospital's profit. The hospital realizes a substantial profit from its practice of supplementing a small contract group of anesthesiologists with a much larger group of

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[100] 686 F.2d at 290-91. The type of direct financial interest that was present in *Hyde* is not as likely to be present in exclusive arrangements with specialists other than anesthesiologists. In perhaps no other hospital-based physician specialty, including radiology and pathology, have allied health professionals, who are likely to be employed by the hospital, taken over the performance of so many of the professional services on which the physician specialist bases his or her charges.

the patient would receive a single bill, with the total amount to include both the charges for services rendered by the radiologist and the charges covering the use of the hospital's labor, equipment, and supplies. The hospital received approximately 60%, and the radiologist 40%, of the total amount paid on those bills. The hospital set the total charges, in consultation with the radiologist, based upon what the hospital's 60% would have to be in order to assure that the hospital's labor, material and equipment costs would be covered.[106] The plaintiff, relying on the Fifth Circuit's ruling in *Hyde*, charged that the hospital was tying the use of its radiology department to the professional services of the contract radiologist and was thus compelling patients who used the radiology department also to use the services of that radiologist.[107]

In distinguishing *Hyde*, the district court found that the defendant hospital was not profiting from the sale of the claimed tied service — the radiologist's professional services — and that the 60% payment received by the hospital did not include any rebate, commission or other payment from the radiologist or any payment for services actually rendered by him. The court found that, in contrast to *Hyde*: "[T]he Hospital itself is not competing in the market for professional radiology services and receives no profit or other payment from any participation in that market."[108] On this basis the district court concluded that the challenged arrangement did not constitute unlawful tying, and the court entered summary judgment for defendants on the antitrust claims.[109]

The court of appeals in *Hyde* was obviously quite disturbed by what it saw as the defendant hospital's participating for, and achieving, a "substantial profit" in the market for services normally provided by anesthesiologists.[110] The court's concern with this element of the tying offense — together with the district court's assumption that this was indeed a tying case, with what the Fifth Circuit felt were the dictates of the new *Maricopa* de-

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[106] *Id.* at 67,564.
[107] *Id.*
[108] *Id.* at 67,565.
[109] *Id.* at 67,566.
[110] *See* 686 F.2d at 291.

single product and when several distinct ones. Cases like the automobile example in the previous paragraph are easily determined. The more difficult cases are resolved by looking at such factors as whether competitors offer the products or services separately; whether the defendant seller prices the products separately; whether that seller itself ever sells the products separately; whether buyers distinguish between the two products;[114] and whether the practice in the industry is to sell the products as a package.[115] No one factor controls.

As had the district court, the court of appeals in *Hyde* concluded, without discussion or explanation, that surgery and anesthesia were different services.[116] The court noted simply, "It is also clear that we are dealing with two distinct services which a buyer should be able to obtain separately."[117] In effect, this seems to say that because the two services, surgery and anesthesia, *may* be purchased separately, they *must* be purchased separately. But how do the purchasers — the patients or their surgeons — see the two services? Would it not be more realistic to expect that a patient or referring physician sees surgery and anesthesia as one package of interrelated and practically inseparable services? Very few patients want the surgery without the anesthesia, and fewer still need the anesthesia if they are not also purchasing the surgery. And if anesthesia is a separate service to patients using the hospital, what about oxygen, blood, nursing services and food? Must a hospital give its patients a choice among various purveyers of these goods or services? This certainly has not been the practice in the industry.

On the other hand, surgical facilities and anesthesia services are sold separately at many hospitals. Moreover, even hospitals which do not tie together those services do generally price them separately.[118] Patients or their physicians may differentiate between hospital services and anesthesiological services, particu-

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[114] *See* United States v. Jerrold Elecs. Corp., 187 F. Supp. 545, 558-61 (E.D. Pa. 1960), *aff'd*, 365 U.S. 567 (1961) (per curiam).

[115] *See* Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 613 (1953).

[116] *See* 686 F.2d at 289; 513 F. Supp. at 540.

[117] 686 F.2d at 289.

[118] *See, e.g., Dos Santos*, 684 F.2d at 1348.

larly in a sub-specialty such as obstetric anesthesiology.[119] Also, physicians and hospitals are subject to separate licensing systems and to separate reimbursement requirements under such programs as Medicare and Medicaid.[120]

It is from the Supreme Court's discussion of the separate product or service question in *Hyde* that the most thunder can be heard, even though the lightning is not yet visible. While the Court ultimately found that on the facts before it surgery and anesthesia were separate services for tying purposes,[121] the Court's discussion of how the separate product determination should be made will be a favorite citation of hospitals and other defendants charged with tying.

The *Hyde* opinion stresses that the important question is not whether two separate products are tied together but, rather, whether "two distinguishable product markets" are linked. This determination must be made in light of an examination of the challenged arrangement and its potential for having the type of "competitive consequences" addressed by the tying rule.[122] The question which must be answered in making the separate product determination is this: "whether there is a possibility that the economic effect of the arrangement is that condemned by the rule against tying — that petitioners have foreclosed competition on the merits in a product market distinct from the market for the tying item."[123] The court rejected the hospital's argument that sale of a package of services, such as anesthesiology and surgery, does not involve a tying arrangement because the different parts of the package are functionally integrated. Separate products having markets which are "distinguishable in the eyes of buyers" are not squeezed into a single product market simply because they are functionally related.[124]

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[119] *See Hyde,* 52 U.S.L.W. at 4391, 4391 n.36.

[120] *See* 48 Fed. Reg. 39,740 (1983) (eliminating combined billing procedure in Medicare program).

[121] 52 U.S.L.W. at 4391.

[122] *Id.* at 4390. Later in the opinion the Court described such a consequence as "the obviously unreasonable impact on purchasers that has characterized the tying arrangements that this Court has branded unlawful." *Id.* at 4393.

[123] *Id.* at 4390.

[124] *Id.* at 4389-90.

The question, then, is when in a hospital setting is there a "product market distinct from the market for the tying item"? The Supreme Court answers that this depends upon whether it is "efficient" for a seller to sell the two products or services separately: "Thus, in this case no tying arrangement can exist unless there is a sufficient demand for the purchase of anesthesiological services separate from hospital services to identify a distinct product market in which it is *efficient* to offer anesthesiological services separate from hospital services."[125]

But after noting the importance of separate product markets and of the tied product market's being one in which it is efficient to offer that product separately, the Court in analyzing the evidence touches lightly on the first of these concerns, and ignores the second altogether. First, the Court makes certain observations relating to the nature of the demand for the two services: "patients and their physicians frequently do differentiate between hospital services and anesthesiological services, and request specific anesthesiologists"; there "was no testimony that patients or their surgeons do not differentiate between anesthesiological services and hospital services when making purchasing decisions"; "the anesthesiological component of the package offered by the hospital could be provided separately"; "anesthesiological services are billed separately from the hospital services petitioners provide"; "patients or surgeons often request specific anesthesiologists to come to a hospital and provide anesthesia"; and "the choice of an anesthesiologist separate from the choice of a hospital is particularly frequent in respondent's specialty, obstetric anesthesiology."[126] On this basis, the Supreme Court concluded that the hospital's arrangement combined the purchase of "two distinguishable services in a single transaction," and, without saying more about separate product markets, that this satisfied the separate product requirements of the tying rule.[127]

Most of these observations are fact-specific and may well limit the Court's "distinguishable services" conclusion in *Hyde*

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[125] *Id.* at 4390 (emphasis added).

[126] *Id.* at 4390 n.36, 4391.

[127] *Id.*

to ties involving anesthesiology, and perhaps just obstetric anesthesiology. It is difficult to imagine that a patient's request for a specific radiologist, pathologist, or emergency room physician would be "particularly frequent."[128] On the other hand, could the Court seriously consider it significant that the anesthesiologists' services could be provided separately or were billed separately? Components of almost any product *could* be purchased separately, and separate billing may be nothing more than a hospital's bowing to the requests or dictates of third-party payors.

Even if physicians and patients do distinguish between the two products, what of the Court's requirement that the second market be one in which it is efficient to offer the second product or service separately from the first? The *Hyde* opinion notes only that some other hospitals offer the services separately.[129] The Court does not consider whether there may be efficiencies gained by offering particular physicians' services together with other hospital services, as East Jefferson Hospital did. Does the Court mean that it is "efficient" to offer otherwise distinguishable services separately if it is merely "possible" to do so?

The Court's citation to decisions of lower courts on this point indicates that there may be more to this efficiency requirement. In *Siegel v. Chicken Delight, Inc.*,[130] the court of appeals for the Ninth Circuit found that courts must look to the "function of the aggregation" in determining whether a combination of separable items should be regarded as one or more products for tie-in purposes.[131] This evaluation requires some determination of whether there are special cost savings generated by the package sale: "Consideration is given to such questions as whether the amalgamation of products resulted in cost savings apart from those reductions in sales expenses and the like normally attendant upon any tie-in, and whether the items are normally sold or used as a unit with fixed proportions."[132]

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[128] *See id.*

[129] *Id.* at 4391 n.39.

[130] 448 F.2d 43 (9th Cir. 1971).

[131] *Id.* at 48.

[132] *Id.; see also* Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1215 (9th Cir. 1977) (legitimate cost savings and use as a unit with fixed proportions are considerations in making separate product determination).

If the Court intended to require such an examination, however, where is the Court's examination in *Hyde*? There is no comparison of the relative cost or efficiency of providing anesthesia services with one anesthesiologist in each operating room, and providing anesthesia services with a smaller number of anesthesiologists supervising a larger group of lower-priced anesthetists. A comparison of the two approaches may have revealed that it is not "efficient to offer anesthesiological services separately from hospital services."[133] The lower courts will almost certainly have an opportunity to decide what the Supreme Court meant.[134]

C. *Market Power*

The central feature of an unlawful tying arrangement is the seller's use of its control of a particular product to force purchasers to take a second product which the purchasers might have preferred to purchase from someone else on different terms.[135] Thus, unlawful tying requires that the seller have some economic power, some advantage that generates customer preference in the tying product market sufficient to coerce or require

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[133] 52 U.S.L.W. at 4390.

[134] The concurring opinion by Justice O'Connor adds little illumination, continuing blithely to cast aside precedent—embodying real world judicial experience and congressional intent—in the pursuit of an economic theory based on hypothetical market models. The Justice states that in order to be treated as separate products, two items must be, in effect, unrelated functionally:

> For products to be treated as distinct, the tied product must, at a minimum, be one that some consumers might wish to purchase separately *without also purchasing the tying product*[.] When the tied product has no use other than in conjunction with the tying product, a seller of the tying product can acquire no *additional* market power by selling the two products together.

Id. at 4395 (footnote omitted) (emphasis in original). This might make sense if the sole goal of the antitrust laws was to prevent the sort of "economic injury" with which the Justice is concerned. However, as noted by the majority, Congress had other objectives, one of which was preservation of smaller, non-dominant businesses and the competitive environment which their existence encourages. *See supra* notes 75-76 and accompanying text. Moreover, as the majority pointed out, the separate product determination has never been so directly harnessed to functional relation: "We have often found arrangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices." [Citations omitted.] 52 U.S.L.W. at 4390 n.30.

[135] *Hyde*, 52 U.S.L.W. at 4388.

the purchase of the tied product.[136] If the seller of the tying product does not have such power, the prospective buyer can simply refuse to purchase the combined products from that seller. The Supreme Court in *Hyde* reversed the Fifth Circuit's ruling, and found that the arrangement did not constitute unlawful tying, because this required market power was missing.

In order to evaluate market power, one must first determine the market in which the power is or could be exercised. The first step is deciding the product market in which the tying product must compete, a market which includes the tying product and reasonably interchangeable alternatives.[137] Once the product market is determined — in this discussion, the market for hospital services — the next step in proving sufficient market power is a demonstration of the relevant geographic market for the hospital's services. This geographic market is, generally, the area in which the hospital is competing with other sellers for customers, *i.e.*, patients. If sellers in a particular geographic area can increase prices without promptly generating competition from and losing sales to sellers from outside that area, those sellers are operating in a separate geographic market from sellers in other areas.[138] Various factors, including restrictions such as licensing requirements or third-party reimbursement limitations, may influence the scope of a geographic market.[139]

Then the plaintiff must show that within that geographic market the seller "has the power . . . to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market. In short, the question is whether the seller has some advantage not shared by his competitors in the market for the tying product."[140]

What is required for a hospital to have this advantage? In *Hyde*, the plaintiff contended that the East Bank of Jefferson Parish was the relevant geographic market. The inflow figures

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[136] United States Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610, 619-21 (1977).

[137] *See* United States v. DuPont & Co., 351 U.S. 377, 395 (1955).

[138] *See* ANTITRUST ADVISER § 1.58 (C. Hill 2d ed. 1971); SULLIVAN, *supra* note 54, at § 19.

[139] For a general discussion of geographic market definition, see SULLIVAN, *supra* note 54, at § 19.

[140] United States Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610, 620-21 (1977).

showed that 70% of the patients at the defendant hospital came from the East Bank; however, 70% of the residents of the East Bank went to other hospitals in the New Orleans area.[141] It seems rather obvious from these figures that the hospitals which were attracting the other 70% of the patients from the East Bank placed some competitive restraints on the defendant hospital's power to coerce anyone. If that hospital were to raise its prices or otherwise impose undesirable requirements upon prospective patients, there were other options available.[142]

Both the district court and the Fifth Circuit observed that patients tend to use a hospital close to home if they can.[143] The Fifth Circuit then found that, while in a traditional analysis the market for the tying product would be larger than the defendant hospital's local area, certain "market imperfections in the health care industry" made location *the* controlling market or competitive variable. The court of appeals stated that the traditional analysis "assumes that the health care industry functions as a competitive market in the same sense as the industries involved in the plethora of other tying cases and should be subject to the same standards. This is not correct."[144] The court found that two market imperfections in the health care industry "favor public, non-profit entities like East Jefferson Hospital."[145] These imperfections were the lack of price competition, resulting from the prevalence of third-party payors, which eliminates the incentive of patients to consider a hospital's cost effectiveness, and the patients' lack of knowledge regarding the quality of care, which means a patient is "likely to purchase his medical care from a non-profit entity that has no apparent profit motive to cut quality."[146] The court then found that the relevant geo-

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[141] 686 F.2d at 289-90.

[142] 513 F. Supp. at 543. However, the District Court overstated the required showing of market power, or at least that which was required prior to the Supreme Court decision: "[t]herefore plaintiff must show that East Jefferson *dominated* the market which at least includes the Orleans Parish hospitals which are located on the East Bank. This plaintiff has failed to do." *Id.* at 542-43 (emphasis added). *See infra* notes 150-53 and accompanying text.

[143] 686 F.2d at 290; 513 F. Supp. at 543.

[144] 686 F.2d at 290.

[145] *Id.*

[146] *Id.*

graphical market area for a hospital is much smaller than that which the district court had found. The court concluded that since 30% of the East Bank patients chose East Jefferson, that hospital had sufficient market power in the tying product market to coerce purchases of the tied service.[147]

This analysis of market power, or rather conclusion based on virtually no analysis, took all of two paragraphs. The Fifth Circuit cited no evidence for its conclusions that the lack of price competition in health care favors public hospitals over private ones. Neither did the court cite or rely on any evidence that patients presume the profit motive will lead private hospitals to deliver lower quality care than public hospitals. Finally, the court cited no evidence that patients or doctors are unable to compare hospitals based upon the general quality of care provided.[148]

The Supreme Court rejected the Fifth Circuit's conclusion that the East Jefferson Hospital had the type of market power needed for unlawful tying. The Court held that since the key to tying is the "forcing" of a second product purchase which the buyer might not make willingly, market power must be "significant" and "dominant" and may not be inferred simply from consumers' preference for a particular product or service.[149]

The Court's ruling that only a dominant market position[150] by the seller of the tying product will constitute sufficient market power for tying represents a direct departure from the Court's holding in its last major tying decision, *United States Steel Corporation v. Fortner Enterprises, Inc. (Fortner II)*.[151] In both *Fortner Enterprises, Inc. v. United States Steel Corporation (Fortner I)*[152] and *Fortner II*, the Supreme Court expressly held that the tying product seller need not have a dominant po-

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[147] *Id.* at 291.

[148] This does not, of course, mean that a hospital could not have the required market power to force whatever requirements it wished upon its customers, regardless of their ability to compare quality of service. *See infra* note 161 and accompanying text.

[149] 52 U.S.L.W. at 4389, 4392.

[150] 52 U.S.L.W. at 4392.

[151] 429 U.S. 610 (1977).

[152] 394 U.S. 495 (1969).

sition in the market for the tying product.[153] This may be the most significant aspect of *Hyde* for hospital-physician cases and for tying cases generally.

The only basis offered by Dr. Hyde for finding market power was "the preference of persons residing in Jefferson Parish to go to East Jefferson, the closest hospital."[154] This preference for the closest hospital does not necessarily say anything about whether the hospital has the required market power.[155] The Court found that this preference for the nearby hospital did not produce the type of dominant market position needed to invoke the tying rule, and thus preclude further inquiry into actual competitive conditions in the tied product market.[156] The Fifth Circuit had acknowledged the insufficiency of this preference, according to the Court, by relying upon the power-augmenting market imperfections to buttress the hospital's supposed market power.[157]

The Supreme Court then analyzed each of the market imperfections and found that they add little, if anything, to patient preference, which was inadequate by itself to show the requisite power: "While these factors may generate market power in some abstract sense[,] they do not generate the kind of market power that justifies condemnation of tying."[158]

The Court emphasized that the lack of price consciousness which may be generated by the market imperfections did not force any patient to take anesthesiological services which he or she would not have chosen in the absence of a tie. There was no evidence that the hospital "forced" its chosen anesthesiology services on any unwilling patient:

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[153] 429 U.S. at 620; 394 U.S. at 502-03. "As the court plainly stated in its prior opinion in this case, these decisions do not require that the defendant have a monopoly or even a dominant position throughout the market for a tying product." 429 U.S. at 620.

[154] 52 U.S.L.W. at 4392.

[155] *Id.*

[156] The court noted that market shares comparable to that of the hospital—30% of the area residents chose the hospital—had been found in other cases not to create the likelihood of anti-competitive conduct. *Id.* at 4386, 4392 n.43 (citing United States v. Connecticut Nat. Bank, 418 U.S. 656 (1974); United States v. DuPont & Co., 351 U.S. 377 (1956); Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953)).

[157] 52 U.S.L.W. at 4392; *see also* 686 F.2d at 290.

[158] 52 U.S.L.W. at 4392.

> If consumers lack price consciousness, that fact will not force them to take an anesthesiologist whose services they do not want — their indifference to price will have no impact on their willingness or ability to go to another hospital where they can utilize the services of the anesthesiologist of their choice. Similarly, if consumers cannot evaluate the quality of anesthesiological services, it follows that they are indifferent between certified anesthesiologists even in the absence of a tying arrangement — such an arrangement cannot be said to have foreclosed a choice that would have otherwise been made "on the merits."[159]

The Court's emphasis on the importance of substantial market power as the key to "forcing" should change the mix of future hospital tying cases. It will be extremely difficult, if not impossible, for excluded health care professionals to show that a particular hospital has the "dominant market position" needed to support a tying claim. Although a non-urban defendant hospital may be more susceptible to tying claims, proving the requisite market power will still be a substantial barrier for a plaintiff. Patient preference for a local hospital proves little, if anything; substantial market share is not enough.[160] Perhaps only the isolated rural hospital with an exclusive agreement need worry about having the market power required for unlawful tying.[161]

Conclusions

Hospitals and physicians who enter into exclusive arrangements cannot expect preferential treatment under the antitrust laws. Some form of the *per se* rule, once the harshest of standards, may be applied in evaluating the legality of such arrangements. But the *per se* rule that will now be used to evaluate charges of tying does not have the reach, the vitality, the sometimes harsh simplicity, that it once had or that many feared it

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[159] *Id.*

[160] *Id.*

[161] However, several courts have expressed doubt as to whether the relevant market "can be sliced so small as to embrace only a single hospital." *Dos Santos*, 684 F.2d at 1353; Konik v. Champlain Valley Physicians Hosp. Medical Center, 561 F. Supp. 700, 714 n.15 (N.D.N.Y. 1983) (same).

could have on the management of hospitals. In short, the tying rule, especially after the decision in *Hyde*, will be more difficult to trigger and should not apply to many exclusive arrangements involving hospitals, certainly not as many as would have the rule applied by the Fifth Circuit.

Many exclusive arrangements with hospitals will not even by characterized as tying because the hospital will not be participating for profit in the market for the tied service. Even if the hospital and its contract specialists divide gross billings on a percentage basis, or if the hospital benefits generally from the arrangement, the hospital should not be seen as receiving, as did the defendant in *Hyde*, a direct profit from the sale of the tied professional services. If the hospital is not using the exclusive arrangement to obtain profit in the possibly distinct and separate market for physicians' services, the usual reasons for characterizing an arrangement as tying, whether social or economic, are not present.

Furthermore, in its "separate products" discussion, the Supreme Court in *Hyde* raises what may prove a most significant hurdle for an antitrust complainant. The Court's emphasis on the existence of separate product markets — distinguishable markets which are delineated by demand — may eliminate any threat of liability for tying for arrangements involving most hospital-based specialists. Dr. Hyde engaged in a sub-specialty which, according to the evidence cited by the Court, frequently led patients or physicians to request that he, rather than a regular staff physician, provide the professional service. It is unlikely that many other hospital-based specialties, or sub-specialties, will generate such frequent requests.

Significantly, the Court suggested that the tied product or service markets will not be seen as separate or distinct if there are efficiencies generated by requiring that only specific professionals, those under contract with the hospital, provide certain services. This "efficiency" defense would require a preliminary and perhaps complex analysis of potential justifications for the exclusive arrangement and would make the "per se rule" a simple one in name only.

Finally, the Court in *Hyde* increased the height of an existing barrier to tying liability by declaring that the plaintiff

must show the defendant was "dominant" in the relevant market, the market for the tying product or service. This heightened market power standard should eliminate the threat of tying liability for any hospital in an urban or even non-rural locale.

After *Hyde*, a claim of tying is still a potential weapon for the professional who is excluded by an exclusive arrangement. But the tying window which *Hyde* leaves open may be large enough to admit only claims of tying brought by specialists who can show a distinct and distinguishable demand for their services against geographically isolated hospitals which cannot maintain an efficiency or other business justification defense.

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1983 MISSISSIPPI SUPREME COURT REVIEW

ADMINISTRATIVE LAW

Decisions rendered by the Mississippi Supreme Court in the area of administrative law during the 1983 term were topically diverse.[1]

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[1] Decisions of the supreme court in the area of administrative law that are not discussed textually include: (1) *School Boards*: Western Line Consol. School Dist. v. Greenville Mun. Separate School Dist., 433 So. 2d 954, 958 (Miss. 1983) (MISS. CODE ANN. § 21-1-59 (Supp. 1983) limits availability of referendum for annexation of school district across county lines to Jones County). (2) *Employment Security Commission*: Mississippi Employment Sec. Comm'n v. Philadelphia Mun. Separate School Dist., 437 So. 2d 388, 396 (Miss. 1983) (doctrine of collateral estoppel binds one administrative agency to fact findings of another administrative agency only if the findings were essential to judgment of first agency); McClaurin v. Mississippi Employment Sec. Comm'n, 435 So. 2d 1170, 1174-75 (Miss. 1983) ("reimbursing" employer under MISS. CODE ANN. § 71-5-357 (Supp. 1982) required to reimburse unemployment compensation trust fund for pro-rata percentage of benefits paid to part-time employees in proportion to total amount of base period earnings attributable to employer). (3) *State Bar*: Mississippi State Bar v. A Mississippi Attorney, 437 So. 2d 1227, 1228 (Miss. 1983) (en banc) ("other evidence" not introduced at attorney's constructive criminal contempt trial should be fully developed before complaint tribunal); Walls v. Mississippi State Bar, 437 So. 2d 30, 32, 33 (Miss. 1983) (allegations of attorney misconduct must be proved by clear and convincing evidence in disciplinary proceedings; attorney "open house" not unethical per se); Levi v. Mississippi State Bar, 436 So. 2d 781, 784 (Miss. 1983) (bar association must prove attorney misconduct by clear and convincing evidence both before complaint tribunal and on appeal to supreme court); Phillips v. Mississippi State Bar, 427 So. 2d 1380, 1382 (Miss. 1983) (attorney reinstated to practice after compliance with MISS. CODE ANN. § 73-3-337 (Supp. 1983)). (4) *Other Boards and Commissions*: Riley v. Clayton, 441 So. 2d 1322, 1325-26 (Miss. 1983) (right to limit appellate review in election cases is a statutory power correctly reserved to the legislature); Wiley v. City of Iuka, 441 So. 2d 116, 117 (Miss. 1983) (MISS. CODE ANN. § 21-1-15 (1972) requires posting of notice of proposed annexation in territory sought to be annexed). (5) *Utilities*: Mississippi Pub. Serv. Comm'n v. Coast Waterworks, Inc., 437 So. 2d 448, 450-51 (Miss. 1983) (in setting rate base, Public Service Commission must consider projected future expenses shown with reasonable certainty; Commission must admit and consider revised pro forma operating statement where delay in submission neither intentional nor due to neglect of duty); State *ex rel.* Allain v. Mississippi Pub. Serv. Comm'n, 435 So. 2d 608, 615-21, 624-26 (Miss. 1983) (use of projected test year unsupported by substantial evidence; return of accumulated federal tax reserves over 20-year period remanded to Commission for determination; charitable donations constitute improper operating expense; tax expenses claimed on hypothetical federal tax liability remanded to Commission for determination; investment tax credit added to rate base denied since unsupported by substantial evidence; long-term debt interest and preferred stock dividends excluded from available funds; customers' ability to pay utility rates is factor in determining rates but not controlling; Commission's classification of consumers found reasonable); Mississippi Pub. Serv. Comm'n v.

Constitution nor many state constitutions expressly require it.[6]

Separation of powers is expressly mandated by article I of the Mississippi Constitution, which also provides for the forfeiture of his original office by any member of one branch who accepts an office in another branch.[7] In *Alexander v. State ex rel. Allain*,[8] an action involving countersuits between the Attorney General and thirty-six legislators, the Mississippi Supreme Court considered the effect of these constitutional provisions on various statutes providing for: (a) legislators' service on state administrative boards;[9] (b) legislative involvement

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34 (1935).

[6] *See, e.g.*, O'Donoghue v. United States, 289 U.S. 516, 530 (1933) (separation of powers not explicitly provided in Constitution, but implied through creation of three separate and distinct departments of government); Myers v. United States, 272 U.S. 52, 116 (1926) (separation of powers inferred from views of delegates to Constitutional Convention of 1787 that maintenance of independence between legislative, executive, and judicial branches essential to ensure the liberty of people); Bradner v. Hammond, 553 P.2d 1, 4-5 (Alaska 1976) (separation of powers doctrine implied in state's constitution); Opinion of the Justices, 380 A.2d 109, 113 (Del. 1977) (separation of power implied in state constitutional law).

Many states have separation of powers clauses expressly written into their constitutions. *See, e.g.*, Opinion of the Justices to the House of Representatives, 365 Mass. 639, 309 N.E.2d 476, 480 (1974) (legislative proposal for central data processing system struck down because of explicit separation of powers provision in the state constitution); State *ex rel.* Wallace v. Bone, 304 N.C. 591, 286 S.E.2d 79, 81 (1982) (state constitution contained strongly worded separation of powers provision).

[7] *See* MISS. CONST. art I, §§ 1-2. These sections state:

> Section 1. The powers of the government of the state of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.
>
> Section 2. No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others. The acceptance of an office in either of said departments shall, of itself, and at once, vacate any and all offices held by the person so accepting in either of the other departments.

Id.

[8] 441 So. 2d 1329 (Miss. 1983). The action originated when 17 senators and 19 representatives filed suit against the Attorney General of Mississippi, seeking a declaratory judgment that their service on various state boards and the statutes allowing them to do so were constitutional. On the same day, the Attorney General brought an action against the legislators seeking a declaratory judgment that the statutes violated the Mississippi Constitution since the subject boards were in the executive department of government. The Attorney General also sought to oust the defendant legislators from the legislature or, alternatively, to oust them from the subject boards. *Id.* at 1333-34.

[9] MISS. CODE ANN. § 25-9-109 (Supp. 1983) (speaker of the House to appoint two members of House of Representatives to serve on State Personnel Board); § 25-11-15(2) (1972 & Supp. 1983) (trustees of Public Employees' Retirement System to include chair-

in administrative appointments;[10] and (c) legislative confirmation of executive appointments.[11]

A. *Mississippi's Requirement of Separation of Powers*

The court began its constitutional analysis by inquiring whether the drafters of the 1890 constitution contemplated any exceptions to the separation of powers requirement. It noted several acts of the drafters which manifested an intention that separation of powers among the coordinate branches be complete. First, the drafters had retained the clause contained in each of Mississippi's three previous constitutions requiring that the three branches of government be separate and distinct.[12] Second, they had provided for enforcement of the separation of powers requirement with an automatic penalty clause, which

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men of House Appropriations Committee and Senate Finance Committee); § 25-53-7 (1972) (Central Data Processing Authority to consist of three senators and three representatives); § 27-103-1(1) (1972 & Supp. 1983) (Commission of Budget and Accounting to include *inter alia*, governor, lieutenant-governor, speaker of the House, chairmen of various House and Senate committees and other legislators); § 29-5-1 (1972) (State Capitol Commission to include, *inter alia*, governor, secretary of state, three senators and three representatives); § 43-13-107 (1972) (Mississippi Medicaid Commission to include four legislative committee chairmen); § 49-5-61 (Supp. 1983) (Wildlife Heritage Commission to include three representatives and three senators); § 57-1-3 (1972 & Supp. 1983) (Board of Economic Development to include, *inter alia*, governor, commissioner of agriculture, speaker of House and two other legislators).

[10] MISS. CODE ANN. § 25-9-109 (Supp. 1983) (speaker of House to appoint two representatives to serve on State Personnel Board); § 25-53-7 (1972) (speaker of House to appoint three representatives to serve on Central Data Processing Authority); § 27-103-1 (1972 & Supp. 1983) (speaker of House to name two representatives to serve on Commission of Budget and Accounting); § 29-5-1 (1972) (speaker of House to appoint two representatives to serve on Capitol Commission); § 43-13-107 (1972) (speaker of House to appoint representative to fill vacancy on Medicaid Commission left by House committee chairman disqualified from serving); § 49-5-61 (Supp. 1983) (speaker of House to appoint three representatives to serve on Wildlife Heritage Committee); § 57-1-3 (1972 & Supp. 1983) (speaker of House to appoint one representative and one public member to serve on Board of Economic Development).

[11] MISS. CODE ANN. § 25-9-109 (Supp. 1983) (four members of State Personnel Board); § 43-13-107 (1972) (three members of Medicaid Commission); § 47-5-12 (1972 & Supp. 1983) (all seven members of Board of Corrections); § 57-1-3 (Supp. 1983) (five members of Board of Economic Development).

[12] *Alexander*, 441 So. 2d at 1335. *Compare* MISS. CONST. art. I, §§ 1-2 *with* MISS. CONST. of 1869 art. III, §§ 1-2; *and* MISS. CONST. of 1832 art. II, §§ 1-2; *and* MISS. CONST. of 1817 art. II, §§ 1-2. The court also noted that by moving the distribution of power provisions to the beginning of the 1890 constitution, the drafters intended to give them special emphasis. *Alexander*, 441 So. 2d at 1335.

had not been included in the state's earlier constitutions.[13] Finally, they had deleted a provision, included in each of the earlier constitutions, which had permitted certain exceptions to the separation-of-powers requirement.[14]

The Mississippi Supreme Court concluded from these facts that the drafters of the 1890 constitution intended that there be no exception to the rule that no person serving in one branch of the government may properly "have or exercise any power properly belonging to either of the others."[15] It followed that, without exception, no member of the legislative branch may constitutionally exercise any executive power.[16]

The court defined executive power as the "power to administer and enforce the laws as enacted by the legislature and as interpreted by the courts,"[17] and distinguished legislative power as "the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement."[18] The court then began its analysis of the constitutionality of the several statutes in issue, focusing its inquiry on whether "the power being exercised by the legislature [is] at

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[13] *Alexander*, 441 So. 2d at 1335. *See* MISS. CONST. art. I, § 2 (providing that acceptance of an office in one branch will vacate "of itself, and at once" offices held by the person in another branch).

The *Alexander* court stated, "[W]e conclude, as we must, from this history and language that the drafters of the 1890 Constitution intended to strengthen the constitutional mandate for separation of powers in this state." *Alexander*, 441 So. 2d at 1335.

[14] *Alexander*, 441 So. 2d at 1335. The clause had stated: "[n]o person or collection of persons, being of one of these departments, shall exercise any power properly belonging to either of the others, *except in the instances hereinafter expressly directed or permitted.*" *Id.* (quoting MISS. CONST. of 1817, art. II, § 2) [court's emphasis].

[15] *Alexander*, 441 So. 2d at 1335.

[16] *Id.* at 1339.

[17] *Id.* at 1338. The court stated that "[e]xecution is at the core of executive power." *Id.; see also* Mabray v. School Bd., 162 Miss. 632, 636, 137 So. 105, 106 (1931) (executive power is the power "to put the legislative scheme into effect").

Executive power has also been defined as the power to implement laws, *e.g.*, Greer v. State, 233 Ga. 667, 212 S.E.2d 836, 838 (1975); Book v. State Office Bldg. Comm'n, 238 Ind. 120, 149 N.E.2d 273, 296 (1958); the power to manage government, *see, e.g.*, Starnes v. Sadler, 237 Ark. 325, 372 S.W.2d 585, 586 (1963); Opinion of the Justices, 380 A.2d 109, 116 (Del. 1977); and the power to spend appropriations, *e.g.*, Anderson v. Lamm, 195 Colo. 437, 579 P.2d 620, 623 (1978).

[18] *Alexander*, 441 So. 2d at 1338, *quoting* Springer v. Government of the Philippine Islands, 277 U.S. 189, 202 (1928).

Legislative power has also been defined as the power to determine public policy, *e.g.*, City of Sand Springs v. Department of Pub. Welfare, 608 P.2d 1139, 1146 (Okla. 1980); and the power to appropriate governmental funding, *e.g.*, Welden v. Ray, 229 N.W.2d 706, 710 (Iowa 1975) (citing as the seminal case Colbert v. State, 86 Miss. 769, 775, 39 So. 65, 66 (1905)).

the core of executive power."[19]

B. Legislator Service on State Boards

1. The Commission of Budget and Accounting

Budget-making is a legislative function in Mississippi,[20] as in other American states.[21] Even so, the governor may submit recommendations concerning state budgets for legislative consideration.[22]

In Mississippi, the legislature established a Commission of Budget and Accounting,[23] charged with preparing annual state budgets[24] for consideration by the legislature.[25] In addition to its budget-preparation function, the Commission was given responsibility for administering the expenditure of appropriated funds,[26] including the power to reduce funding for state agencies under certain circumstances;[27] regulating

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[19] *Alexander*, 441 So. 2d at 1345.

[20] *See* Colbert v. State, 86 Miss. 769, 775, 39 So. 65, 66 (1905) (control of government's "purse strings" is a legislative function).

[21] *See, e.g.*, Anderson v. Lamm, 195 Colo. 437, 579 P.2d 620, 623 (1978) (legislative function to appropriate funds for government programs); Welden v. Ray, 229 N.W.2d 706, 710 (Iowa 1975) (legislature states how funds it appropriates shall be used).

[22] *See* MISS. CODE ANN. § 27-103-43 (1972) (providing for governor to submit budget recommendations).

The *Alexander* court noted that MISS. CODE ANN. § 27-103-43 (1972) appears to contemplate merely that the governor will comment on budget recommendations prepared by the Commission of Budget and Accounting. Looking to the general grant of executive powers in MISS. CONST. art. V, §§ 116, 122, however, the court found that the governor was constitutionally empowered to submit an executive budget for legislative consideration. Further, the court observed, this power carried with it the implied power for the governor to establish within the executive department an agency to assist him in preparing an executive budget. The governor could staff such an agency with "persons whose loyalty is to the executive and not to the legislative department of government." *Alexander*, 441 So. 2d at 1340.

MISS. CONST. art. V, § 122 provides: "The governor shall, from time to time, give the legislature information of the state of the government, and recommend for consideration such measures as may be deemed necessary and expedient."

For discussion of the functions of the Commission of Budget and Accounting, see *infra* notes 23-32 and accompanying text.

[23] *See* MISS. CODE ANN. § 27-103-1 (Supp. 1983).

[24] *See id.* § 27-103-13 (1972).

[25] *See id.* §§ 27-103-13, -41, -43 (1972).

[26] *See id.* §§ 27-103-45 to -73 (1972).

[27] *See id.* § 31-17-123 (Supp. 1983) (authority granted to Commission to reduce funding); §§ 27-103-45 to -49 (1972) (requiring agencies to submit estimates of expenditures to the Commission's chairman and its director and authorizing these officials—subject to appeal to the full commission—to reduce such "estimates" upon a find-

purchases by state agencies;[28] administering life and health insurance programs for state employees;[29] and carrying out many other duties.[30] Through the years, the legislature expanded the Commission's functions, giving it authority, for example, over certain disaster relief programs[31] and over a state Office of Telecommunications.[32]

The Commission's membership was fixed by statute to include the governor, lieutenant governor and nine legislators.[33]

The *Alexander* court focused its separation of powers analysis on the Commission of Budget and Accounting, noting that the Commission appeared to be at the center of the controversy.[34]

At the outset, the unanimous court rejected as "legally irrelevant" an argument that inclusion of legislators on the Commission and other boards promoted efficiency in the management of state government.[35]

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ing that sufficient funds would not be available or that the expenditures were not authorized by law).

[28] *See id.* §§31-7-1 to -21 (1972 & Supp. 1983).

[29] *See id.* §§ 25-15-1 to -21 (1972 & Supp. 1983).

[30] *See, e.g., id.* § 7-9-59 (Supp. 1983) (approval of sale, assignment or transfer of securities and investments of special treasury fund); § 25-1-77 (1972) (approval of all state motor vehicle purchases).

[31] *See id.* §§ 27-107-153 to -167 (Supp. 1983) (authorizing Commission to make grants and loans to counties, municipalities, school boards and junior colleges for losses caused by 1979 floods, and empowering the Commission to make findings of fact as to the extent of such losses).

[32] *See id.* §§ 31-7-201 to -225 (Supp. 1983) (giving Commission authority over agency established to control telecommunications services for all state governmental units). Though there has been no judicial interpretation of these statutes, on their face they would seem to give the Commission of Budget and Accounting authority over, for example, telephones in a county circuit clerk's office. *See id.* § 31-7-201 (Supp. 1983) (establishing Office of Telecommunications "under the jurisdiction of the purchase division of the commission of budget and accounting"); § 31-7-209(c) (Supp. 1983) (giving Office of Telecommunications authority to manage all "telecommunications systems under the jurisdiction of the state"); § 31-7-211(b) (Supp. 1983) (making the office "the sole centralized customer for the acquisition, billing and record keeping of all telecommunications systems or services provided to state agencies . . . ."); § 31-7-203 (Supp. 1983) (defining "agency" to include "political subdivisions of the state" and defining "telecommunications equipment, systems, related services" to include "[t]elephone systems").

[33] *See id.* § 27-103-1 (Supp. 1983). From the Senate, the Commission included the president pro tempore, the chairmen of the finance and the appropriations committees, and a member to be named by the lieutenant governor. House of Representatives members of the Commission included the speaker, the chairmen of the ways and means and the appropriations committees, and two members named by the speaker. The governor served as chairman. *Id.*

[34] *Alexander,* 441 So. 2d at 1338.

[35] *Id.* at 1339. The court quoted the United States Supreme Court's observation that

Looking first to the Commission's function in preparing budgets for legislative consideration, the court suggested that members of the legislature and of the executive branch might each have roles in the budget proposal/planning process.[36] Even so, the Commission's mixed legislative-executive composition was unconstitutional. *Any commission or agency,* the court held, that included members of the executive branch and of the legislative branch as voting members violated the "constitutional imperative" of separation of powers.[37]

Having thus found mixed executive-legislative agencies prohibited by the Mississippi Constitution, the *Alexander* court turned its attention to the Commission's duties that went beyond its budget preparation function.[38] Here, the court looked to the nature of the power in

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"the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Id.* (quoting INS v. Chadha, 103 S.Ct. 2764, 2780-81 (1983)).

The court also rejected the legislators' suggestion that legislative service on executive commissions would not be invalid under a "flexible" construction of the separation-of-powers clauses. 441 So. 2d at 1339. This was an apparent reference to the emerging dichotomy between "strict" and "flexible" interpretations of constitutional separation-of-powers requirements. *See* Comment, *Separation of Powers: Legislators Serving on Administrative Boards,* 40 WASH. & LEE L. REV. 171, 175-76 (1983) (two approaches are followed: flexible and strict).

Courts utilizing the "strict" approach allow a legislator to serve on administrative boards only if the service is incidental to the legislative function. *Id.* at 175; *see, e.g.,* Book v. State Office Bldg. Comm'n, 238 Ind. 120, 149 N.E.2d 273, 296 (1958) (legislator's service on State Office Building Commission violated separation of powers since primary duties of Commission were executive); State *ex rel.* Wallace v. Bone, 304 N.C. 591, 286 S.E.2d 79, 88 (1982) (legislator's service on Environmental Management Commission struck down since his duties as Commission member had no relation to legislative law-making function); State *ex rel.* State Bldg. Comm'n v. Bailey, 151 W.Va. 79, 150 S.E.2d 449, 456 (1966) (legislators may not exercise powers that are executive or judicial and not legislative in character). Courts using the "flexible" approach allow a legislator to serve on administrative boards if his membership "represents a cooperative effort with the executive branch." Comment, *supra,* at 176. *See generally* Parker v. Riley, 18 Cal. 2d 83, 113 P.2d 873, 877 (1941) (rigid classification of governmental activities is not required to give full effect to separation of powers); State *ex rel.* Schneider v. Bennett, 219 Kan. 285, 547 P.2d 786, 792 (1976) (absent significant interference of department's operations, usurpation of powers does not occur); State *ex rel.* McLeod v. Edwards, 269 S.C. 75, 236 S.E.2d 406, 409 (1977) (legislators serving on administrative board in cooperative effort with executive branch not violative of separation of powers).

[36] *See Alexander,* 441 So. 2d at 1339-40. While the legislature's appropriation power gave it ultimate responsibility for budget-making (subject to gubernatorial veto), the governor could submit budget recommendations for the legislature's consideration. *See id.; see also supra* notes 20-22 and accompanying text.

[37] *Alexander,* 441 So. 2d at 1340.

[38] *See Alexander,* 441 So. 2d at 1341-42 (listing some 12 diverse powers granted by

question. Administration of appropriations made by the legislature is an executive function, the court stated.[39] Since legislators may not constitutionally perform executive functions, statutes giving budget control responsibilities to a commission with legislative members are invalid.[40] Concluding that many of the other functions of the Commission of Budget and Accounting were essentially executive and administrative, the court declared that legislators could not constitutionally exercise such powers.[41] Thus, the court again[42] made clear that it was the Commission's composition and not its broad powers that ran afoul of

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statute in addition to Commission's budget control authority); *see also supra* notes 26-32 and accompanying text.

[39] *Id.* at 1341. Most other states consider budget control powers as purely executive. *Id.* at 1341 n.4.

[40] *Alexander*, 441 So. 2d at 1341. The Commission's post-appropriation budget control powers are codified at MISS. CODE ANN. §§ 27-103-45 to -73 (1972).

The *Alexander* court's language appeared to allow the legislature to leave the budget control machinery in place if it removed legislators from the Commission. *See Alexander*, 441 So. 2d at 1341.

In a case with facts similar to those in *Alexander*, the Supreme Court of South Carolina reached a different result. In State *ex rel.* McLeod v. Edwards, 269 S.C. 75, 236 S.E.2d 406 (1977), two legislators' membership on the State Budget and Control Board was upheld as a cooperative effort between the legislative and executive departments. The South Carolina Attorney General alleged that the service of legislators on the State Budget and Control Board violated the separation of powers principle. *Id.*, 236 S.E.2d at 407. The chairmen of the House Ways and Means and the Senate Finance Committees served as *ex officio* members of the Board. The South Carolina court stressed the fact that the legislators comprised only a minority of the Board and noted that the committee chairmen provided the Board with valuable expertise. *Id.* at 408-09. *But see* State *ex rel.* Schneider v. Bennett, 219 Kan. 285, 547 P.2d 786, 797-98 (1976) (legislators' membership on state agency with executive powers unconstitutional because it allowed legislature to exert coercive influence on executive branch; the governor was the only agency member who was a member of the executive branch, however).

In Mississippi, among the powers of the Commission of Budget and Accounting was that of reducing agency funding upon a finding that revenues would be insufficient to cover expenditures. *See* MISS. CODE ANN. §§ 31-17-123, 27-103-47 to -49 (1972 Supp. 1983). The *Alexander* court appears to have forbidden participation by legislators in such decisions without formal legislative action. *See Alexander*, 441 So. 2d at 1341 (legislature "prohibited from imposing new limitations, restrictions or conditions on the expenditure of [appropriated] funds, short of full legislative approval").

[41] *See Alexander*, 441 So. 2d at 1341-42. Without engaging in extended analysis of the distinction between executive and legislative functions, the court concluded that these miscellaneous duties of the Commission were not legislative in nature because none of them had "functions essential to the legislative right of providing state policy through the enactment of laws." *See id.* at 1341. Indeed, by repeating this language, the *Alexander* opinion seems to emphasize that legislative functions are *limited* to those necessary for the setting of state policy through enactment of legislation. *See id.*

[42] *See supra* note 40 and accompanying text.

constitutional doctrine.

2. Other Boards and Commissions

The *Alexander* court also reviewed legislator service on eight other boards and commissions.[43] By the same analysis used with the Commission of Budget and Accounting, the court determined that all eight boards and commissions exercised powers constitutionally vested in the executive department.[44] It followed that the statutes authorizing legislator service on those boards and commissions violated the constitution and that the legislators serving on them could not constitutionally continue to do so.[45]

C. *Powers of Appointment*

The *Alexander* court next considered the validity of statutes authorizing legislative appointment of the members of various executive boards and commissions.[46] The legislator-appellants argued that under article IV, section 103 of the Mississippi Constitution[47] and the court's 1980 decision in *Clark v. State ex rel. Mississippi State Medical Association*,[48] the legislature is vested with all powers of appointment not

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[43] *Alexander*, 441 So. 2d at 1342-43. Legislator membership on seven of these boards was provided for by statute. *See supra* note 9. Members of the eighth agency, the Board of Corrections, were appointed by the governor and included one legislator. *See Alexander*, 441 So. 2d at 1343.

[44] *Id.* at 1343. The court reasoned that the primary purpose of all eight boards was to carry out laws already enacted. Further, the court found unpersuasive the legislators' argument that any executive duties were delegated to directors employed by the boards, because these directors remained subject to the control of their respective boards. *Id.*

[45] *Id.; cf.* Opinion of the Justices, 380 A.2d 109, 116 (Del. 1977) (complete legislative authority over executive boards unconstitutional).

[46] *See Alexander*, 441 So. 2d at 1343-45. For a listing of the statutes, see *supra* note 10.

[47] MISS. CONST. art. IV, § 103 provides in part: "In all cases, not otherwise provided for in this constitution, the legislature may determine the mode of filling all vacancies, in all offices . . . ." *Id.*

[48] 381 So. 2d 1046 (Miss. 1980). In *Clark* the Mississippi State Medical Association challenged the authority of three physicians to serve as members of the Mississippi State Board of Health, alleging that the three physicians were not nominated by the Medical Association as required by MISS. CODE ANN. § 41-3-1 (1972). *Id.* at 1047. The physicians, who had been placed on the Board by the governor, argued that the statute unconstitutionally infringed upon the executive power of the governor to make appointments. *See id.* at 1048-49. The *Clark* court examined MISS. CONST. art. V, §§ 116, 123, which vested in the governor the chief executive power and assigned him the duty to faithfully execute laws. The court determined that "[n]either of these sections expressly confers on the governor the broad appointive powers which are now claimed . . .", nor could such a

specifically placed in another branch.[49] The court rejected this sweeping claim of authority, noting that both section 103 and the *Clark* decision dealt only with the legislature's power to prescribe the mode for filling vacancies in executive and administrative offices and not with the ultimate power of appointment.[50]

The court determined that the boards or commissions over which the statutory legislative appointment powers were claimed were performing essentially executive functions,[51] and held that article V of the constitution, which creates and empowers the executive department, vests in the executive branch exclusive power to appoint executive subordinates to assist it in the discharge of executive duties.[52] Conse-

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grant of powers be implied. *Id.* at 1049. Furthermore, the court stated that the only general power of appointment vested in the governor is that conferred by legislative enactment pursuant to the provision in MISS. CONST. art. IV, § 103 that the legislature may determine the mode of filling vacancies in office. The *Clark* court held that the statutes in question did not infringe upon the governor's constitutional powers. *See Clark*, 381 So. 2d at 1050. The legislators in *Alexander* apparently relied upon the language in *Clark* as authority for the view that the appointive powers of the governor are limited. *See Alexander*, 441 So. 2d at 1344.

[49] *Alexander*, 441 So. 2d at 1344.

[50] *Id.* at 1344-45. The *Alexander* court determined that since *Clark* only considered the constitutionality of the legislature enacting the mode for filling vacancies, but did not consider the ultimate right of appointment, *Clark* was no authority for the legislators' contention that the legislature is vested with all the powers of appointment not specifically granted to another branch. *Alexander*, 441 So. 2d at 1344-45. *See generally 1980 Mississippi Supreme Court Review: Administrative Law*, 51 MISS. L.J. 389, 406-07 (1981) (discussion of *Clark* decision). *Alexander* limited *Clark* to the holding "that the Mississippi Medical Association, a private voluntary association, may appoint three members of the State Board of Health, an agency whose duties are executive." *Alexander*, 441 So. 2d at 1344. In addition, the court noted that appointments to an executive agency by a voluntary association having no ongoing connection with the prerogatives of the legislative or executive departments do not usurp either department's power, nor reach the constitutional proportions of the instant case. *Id.* at 1344-45.

[51] *Alexander*, 441 So. 2d at 1343.

[52] *Id.* at 1345; *see* MISS. CONST. art. V, § 116 (chief executive power vested in governor). Adhering to its method of analysis, the court concluded that the power to appoint his assistants and subordinates lies at the core of the governor's executive powers under article V. *Alexander*, 441 So. 2d at 1345.

Other courts faced with similar constitutional provisions are in accord. *See, e.g.*, Springer v. Philippine Islands, 277 U.S. 189, 202 (1927) (power to enforce laws and appoint agents charged with such enforcement is an executive function); Bradner v. Hammond, 553 P.2d 1, 6 (Alaska 1976) (governor clothed with power to appoint subordinate executive officers to aid in carrying out laws); Ahearn v. Bailey, 104 Ariz. 250, 451 P.2d 30, 33 (1969) (en banc) (power to "faithfully" execute laws requires power to select subordinates); Opinion of the Justices, 374 A.2d 638, 639 (N.H. 1977) (proposed legislative selection commission to nominate judges encroached upon gubernatorial power).

quently, the statutes mandating legislative appointments to executive agencies were declared unconstitutional.[53]

D. Confirmation Power

Finally, the court considered the Attorney General's contention that statutes requiring that gubernatorial appointments to executive offices be subject to the advice and consent of the Senate also amounted to a legislative usurpation of executive power.[54] The court rejected this contention, reasoning that since confirmation power is wholly negative, the Senate retaining no control over the appointees once confirmed, and since the power to confirm executive appointments is not expressly vested in either the legislative or executive branches by the constitution, then the power of the Senate to confirm executive appointments is not an invasion of executive power.[55] Instead, the court concluded that the confirmation power is implicitly within the legislative prerogative, serving as a necessary legislative check on executive power.[56] However, the court warned that the legis-

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[53] *Alexander*, 441 So. 2d at 1345.

[54] *Id.* at 1345-46; *see supra* note 11 and accompanying text.

[55] *Id.* at 1345-46. Other courts deciding separation of powers cases under constitutional provisions similar to Mississippi's have also held that legislative use of the confirmation power is constitutional. *See, e.g.*, People *ex rel.* MacMahon v. Davis, 284 Ill. 439, 446, 120 N.E. 326, 329 (1918) (approval of appointee by municipal council not an appointment); State *ex rel.* Brothers v. Zellar, 7 Ohio St. 2d 109, 113, 218 N.E.2d 729, 732 (1966) (senate's "advice and consent" function involves exercise of negative power only); Briggs v. State Dep't of Retirement Sys., 28 Wash. App. 257, 622 P.2d 1301, 1304 (Wash. Ct. App. 1981) (confirmation distinguished from the appointment itself since senate does not in any sense choose appointee).

[56] *Alexander*, 441 So. 2d at 1346. The court noted that the United States Constitution provides the national Senate the power of advice and consent, and that the draftsmen of the 1890 Mississippi Constitution undoubtedly contemplated a similar power for the Mississippi Legislature. *Id.* at 1345-46. *See* U.S. CONST. art. II, § 2, cl. 2 (power of the President to appoint top executive officials shall be "by and with the Advice and Consent of the Senate"). The *Alexander* court pointed out that the Mississippi Constitution creates certain "checks and balances," and held that the confirmation power is an appropriate check against the other departments. 441 So. 2d at 1346; *see, e.g.*, MISS. CONST. art. V, § 124 (power of judiciary checked by governor's pardon power); *id.* art. IV, §§ 49-53 (powers of judiciary and executive checked by legislature's powers of impeachment); Albritton v. City of Winona, 181 Miss. 75, 96, 178 So. 799, 803 (1938) (provides guidelines for determining when judiciary may declare acts of the legislature unconstitutional); Jackson County v. Neville, 131 Miss. 599, 625, 95 So. 626, 628 (1923) (governor's veto power is both exercise of and check on legislative power).

Considering a similar question regarding the United States Constitution, the United States Supreme Court held that the Senate's confirmation power was a check on the executive power to appoint. *See* Myers v. United States, 272 U.S. 52, 138 (1926) (advice

lature could constitutionally exercise its confirmation power only over top discretion-exercising executive and administrative officials and held simply that the statutes challenged by the Attorney General were not impermissibly invasive of the executive power.[57]

E. The Legislative Response

As this issue of the *Mississippi Law Journal* was going to press, Governor Bill Allain (who, as Attorney General, had challenged legislator membership on boards and commissions in *Alexander*) signed into law a comprehensive administrative re-organization measure dealing with many of the agencies and functions at issue in *Alexander*.[58] Consideration of this measure is beyond the scope of the present effort.

F. Conclusion

In the end, the *Alexander* court stopped short of ousting the legislators found to be unconstitutionally serving on executive boards and commissions from the legislature, though it reiterated that such a remedy was well within its power under article I, section 2 of the Mississippi Constitution. Instead, it declared that it would rely on the legislators to abide by their oaths to uphold and defend the constitution, implicitly inviting them to resign from their executive positions volun-

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and consent powers of Senate are plainly qualifications of the general executive powers of appointing officers and making treaties).

[57] *Alexander*, 441 So. 2d at 1346. The court did not define "top discretion exercising officials," but did state: "the personal staffs of elected executive officers are not subject to confirmation, nor are the members of advisory commissions or boards." *Id.* The court limited the scope of the confirmation power by saying that it "may not be enforced so that the legislature substantially exercises or controls functions at the core of executive power." *Id.* This limitation apparently would apply in a situation similar to that found in Bradner v. Hammond, 553 P.2d 1 (Alaska 1976), where the Alaska Supreme Court examined the constitutionality of various statutes which provided that appointment of deputy heads of each principal executive department and of directors of 19 specified divisions were subject to confirmation by the legislature. *Id.* at 2. Alaska's constitution specifically provided for legislative confirmation of the heads of "principal" departments and of a "board or commission" when it is "at the head of a principal department." ALASKA CONST. art. III, §§ 25, 26. The *Bradner* court concluded that the plethora of statutes requiring confirmation of the deputy heads and 19 specified directors exceeded the confirmation authority granted by the constitution. 533 P.2d at 7-8. The court noted that to allow such legislative confirmations would encroach upon the executive because "there would be no logical termination point to the legislature's confirmation of executive appointments." *Id.* at 8.

[58] *See* Mississippi Administrative Reorganization Act, ch. 488, 1984 Miss. Laws 460.

tarily.[59] In addition, the court delayed the effective date of its declaratory judgment until July 1, 1984, to permit an orderly reorganization.[60]

The court's separation-of-powers analysis will undoubtedly be characterized as strict,[61] limiting opportunities for interbranch cooperation.[62] Moreover, the court has sent a clear signal that disputes arising under the separation of powers clauses of article I are justiciable. The standards articulated by the court are imprecise: "constitutional trespass" occurs whenever a member of one coordinate branch exercises functions at the "core" of another branch's constitutional power.[63] Certainly further litigation may be expected as the three branches of government seek further to delineate the practical contours of their constitutional powers and to ascertain whether other statutes authorize such an intrusion by one branch into another branch's "core" functions so as to give rise to constitutional trespass.

By accepting the role of constitutional referee between the coordinate branches, the court has embarked on a course which, if managed rashly, could precipitate a constitutional crisis in which one of the other branches, for political reasons, chooses to defy a judgment of the court. Nevertheless, although disputes over the allocation of powers under a constitution are viewed as being near the fringes of a court's power of adjudication,[64] courts have generally rejected the notion that

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[59] *See Alexander*, 441 So. 2d at 1347.

[60] *Id.*

[61] *See supra* note 35.

[62] *Cf.* State *ex rel.* Schneider v. Bennett, 219 Kan. 285, 547 P.2d 786, 791 (1976) (interbranch cooperation promotes governmental economy and efficiency); State *ex rel.* McLeod v. Edwards, 269 S.C. 75, 236 S.E.2d 406, 409 (1977) (executive Budget and Control Board profited from service by chairmen of two legislative finance committees); Comment, *supra* note 35, at 189 (strict application of separation of powers considered inappropriate).

[63] *See Alexander*, 441 So. 2d at 1345, 1347.

[64] Thus during the Vietnam War, federal courts routinely declined to enjoin the prosecution of the war, which was challenged as unauthorized by Congress. This was so even where such suits were brought by members of Congress. *See, e.g.*, Harrington v. Schlesinger, 528 F.2d 455, 459 (4th Cir. 1975) (congressman lacked standing); Holtzman v. Schlesinger, 484 F.2d 1307, 1309-10, 1314 (2d Cir. 1973) (non-justiciable political question; congresswoman lacked standing); Mitchell v. Laird, 488 F.2d 611, 616 (D.C. Cir. 1973) (whether President had proceeded in good-faith attempt to end war promptly was not judicially manageable question); *see also* cases cited in *Holtzman*, 484 F.2d at 1312 n.3.

Members of Congress have been held to lack standing to challenge the legality of actions of agents of the executive branch, Harrington v. Bush, 553 F.2d 190, 215 (D.C. Cir. 1977), and the composition of statutorily regulated advisory commissions, Metcalf v. Nat'l Petroleum Council, 553 F.2d 176, 177 (D.C. Cir. 1977). On the other hand, they have been held to have standing to challenge executive actions which diminished the

disputes which present "political" questions or which involve inter-branch disputes are inherently non-justiciable.[65]

The *Alexander* court wisely chose to rely on the good faith of the legislators to adhere to its declaratory judgment that the statutes in question are unconstitutional.[66] Future decisions in this area will require similar delicacy and a fine sensitivity to the reaches of the judiciary's political power to ensure that the constitutional objectives of the separation-of-powers clauses may be accomplished.

II. Worker's Compensation Hearsay Exception[67]

Although in proceedings brought pursuant to Mississippi's Work-

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effectiveness of their legislative voting power, including the illegal nullification of congressional acts, Kennedy v. Sampson, 511 F.2d 430, 433 (D.C. Cir. 1974), and the termination of a treaty without Senate approval, Goldwater v. Carter, 617 F.2d 697, 702 (D.C. Cir.), *vacated and remanded on other grounds*, 444 U.S. 996 (1979).

[65] *See, e.g.*, United States v. Nixon, 418 U.S. 683, 693 (1974)(justiciability is not defeated by assertion of claim as "intra-branch" dispute); Baker v. Carr, 396 U.S. 186, 217 (1962)(courts cannot reject a "bona fide controversy" of whether a "political" action exceeds constitutional authority). *But see* Goldwater v. Carter, 444 U.S. 996, 1004 (1979) (Rehnquist, J., concurring) (dispute between coequal branches is non-justiciable political question).

[66] *Alexander*, 441 So. 2d at 1347. The court noted that the removal of legislators for constitutional trespass is within its judicial authority. *Id.; see* Miss. Const. art. I § 2.

[67] Decisions in the workers' compensation area during 1983 that are not discussed textually are: Myles v. Rockwell Int'l, 445 So. 2d 528, 536-37 (Miss. 1983) (viewing evidence as a whole, claimant was awarded total permanent disability benefits for injuries that caused permanent emotional disorder even though doctors could not exactly determine physical cause of claimant's disability); Harris v. Chicago Mills Lumber Co., 441 So. 2d 557, 558-59 (Miss. 1983) (claimant failed to meet burden of proof to support award of permanent partial disability because medical evidence did not establish permanent injury); Tripp v. Orkin Amusement, Inc., 437 So. 2d 1013, 1013 (Miss. 1983) (claimant's compensation award for permanent disability correctly limited to two-thirds of average weekly wage earned by claimant prior to disability); Johnson v. Ferguson, 435 So. 2d 1191, 1195-96 (Miss. 1983) (commission decision based on testimony by physician who did not perform complete examination of claimant not supported by substantial evidence where testimony was contradicted by physician who performed complete examination of claimant); Webb v. Hunter, 431 So. 2d 1131, 1133 (Miss. 1983) (applying rule that proof of course of employment may be made by any state of facts from which such employment may be reasonably inferred); Union Camp, Inc. v. McCall, 426 So. 2d 796, 799 (Miss. 1983) (parents entitled to partial dependency death benefits where son worked on farm and contributed to family income).

Also, in the area of workmen's compensation the court, in Bowen v. Magic Mart of Corinth, 441 So. 2d 548, 549-50 (Miss. 1983), held that an employer is not entitled to a credit for medical expenses paid by a claimant's personally secured and paid medical insurer. *Id.* In *Bowen*, the claimant was injured in the course of her employment. The employer initially refused to pay compensation and between the time of injury and the

men's Compensation Act,[68] the Workmen's Compensation Commission is not bound by the strict rules of evidence applicable in ordinary civil trials,[69] it may not completely disregard the statutory and common law rules of evidence without violating due process.[70] Ordinarily, drawing the line between admissible evidence and inadmissible evidence is left

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time of settlement, the claimant filed a claim with Blue Cross under a personally owned medical insurance policy. Upon settlement of the claim, the employer and its compensation carrier refused to reimburse the claimant for the medical expenses previously paid by Blue Cross, and this decision was subsequently affirmed by both the workmen's compensation administrative judge and the Workmen's Compensation Commission. *Id.* at 548-49.

On appeal, however, the supreme court reversed. *Id.* at 550. The court cited the requirement of MISS. CODE ANN. § 71-3-15 (1972 & Supp. 1983) that " '[t]he employer shall furnish such medical, surgical, and other attendance or treatment . . . as the nature of the injury may require.' " *Bowen*, 441 So. 2d at 549. The court also relied heavily on the South Dakota Supreme Court's decision in Meyers v. Meyers Oil Co., 88 S.D. 166, 216 N.W.2d 820 (1974), which involved a factual setting similar to that in *Bowen*. *Bowen*, 441 So. 2d at 550. The South Dakota Supreme Court held that since accident insurance is a matter of private contract, it should not affect a claimant's right to recover under the workmen's compensation law. *Meyers*, 216 N.W.2d at 821. Applying both § 71-3-15 of the Mississippi Code and *Meyers*, the Mississippi Supreme Court concluded in *Bowen* that the employer "cannot be allowed to derive a benefit under a health and accident insurance policy bought and paid for by the employee." Thus, the employer was not entitled to a credit for medical expenses paid under the private medical insurance contract. *Bowen*, 441 So. 2d at 550.

[68] MISS. CODE ANN. §§ 71-3-1 to -111 (1972 & Supp. 1983).

[69] MISS. CODE ANN. § 71-3-55 (1972). *See also* Miss. Workmen's Compensation Law, Procedural Rule 8 (1982) (general rules of evidence are relaxed; any relevant and competent evidence may be introduced at compensation hearing); Goasa & Son v. Goasa, 208 So. 2d 575, 578 (Miss. 1968) (rules of evidence for workmen's compensation not the same as those prescribed for ordinary civil actions); Wells-Lamont Corp. v. Watkins, 247 Miss. 379, 386, 151 So. 2d 600, 603 (1963) (Commission is fact-finding agency so procedures more informal than in ordinary civil action).

This approach is consistent with the rule in other states. *See, e.g.*, Clark v. Peabody Testing Serv., 265 Ark. 489, 579 S.W.2d 360, 368 (1979) (Commission not bound by strict rules of evidence in admission or consideration of evidence); Miller v. Commercial Union Ins. Co., 182 So. 2d 697, 698 (La. Ct. App. 1966) (rules of evidence are to some extent relaxed in workers' compensation cases); *see also* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 14.05 (1st ed. 1958); C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE §§ 348-49 (2d ed. 1972).

In some jurisdictions, hearsay has been held admissible within discretionary limits. *See, e.g.*, Phelps Dodge Corp. v. Industrial Comm'n, 114 Ariz. 252, 560 P.2d 436, 440 (Ariz. Ct. App. 1977) (testimony based upon hearsay goes to weight of testimony rather than to admissibility); Rivers v. Macco, 391 So. 2d 873, 876 (La. Ct. App. 1980) (hearsay admissible within discretionary limits).

[70] Cooper's, Inc. v. Long, 224 So. 2d 866, 870 (Miss. 1969); V. DUNN, MISSISSIPPI WORKMEN'S COMPENSATION § 261, at 317 (3d ed. 1982).

to the Commission's sound discretion.[71] In line with these general rules, the Mississippi Supreme Court, in *Hercules, Inc. v. Walters*,[72] held that the report of a deceased physician was properly admitted in evidence in a worker's compensation hearing.[73]

The claimant in *Hercules* had fallen and injured his left wrist in 1951 while employed at Hercules, Inc. In his report to the company, the attending physician, Dr. T.E. Ross, had described the injury as a sprain and noted that the claimant's x-ray showed an "old" fracture in the left wrist and that the patient had a history of a wrist injury nine years earlier. At the time of Dr. Ross' examination, the claimant had worked for the company for six or seven years.[74]

In 1976, Dr. William G. Giles examined the claimant and found severe degenerative arthritis in the left wrist. Dr. Giles' x-rays also showed a previous fracture. Dr. Giles concluded that the claimant's present wrist problems resulted from a fracture and not a sprain. Dr. Giles further stated that if the information in Dr. Ross' 1951 report was true, the claimant's wrist problem resulted from a fracture suffered nine years before December 1951,[75] the time of the job injury diagnosed by Dr. Ross as a sprain.[76]

Though Dr. Ross had died before the commencement of any proceedings on the claim, and no hospital records of Dr. Ross' 1951 examination of the claimant could be found, Dr. Ross' report was introduced in the hearing before the administrative judge. The administrative judge denied the claim, having concluded that the claimant's problems with his wrist resulted from a fracture that occurred before his employment with Hercules. The Workmen's Compensation Commission affirmed the administrative judge's order.[77] Claimant appealed to the Circuit Court of Forrest County, which held that it was error to admit the report of Dr. Ross into evidence as hearsay,[78] and that the report

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[71] *See* V. DUNN, *supra* note 70. (Commission may relax rules within sound discretion to develop facts more fully).

[72] 434 So. 2d 723 (Miss. 1983). Justice Sugg, retired justice of the Mississippi Supreme Court, wrote the opinion, in accordance with MISS. CODE ANN. § 9-3-6 (Supp. 1983).

[73] *Hercules*, 434 So. 2d at 727.

[74] *See id.* at 724. The claimant was hired by Hercules in 1945 and was treated by Dr. Ross in December 1951. The physician's 1951 report stated: "Sprain of left wrist. History of injury to wrist nine years ago. X-ray shows old fracture of navicular bone and a deformity of lunate bone." *Id.*

[75] *Id.* at 725.

[76] *Id.* at 724.

[77] *See id.* at 725.

[78] *Id.* Professor McCormick defines hearsay evidence as "testimony in court, or writ-

was neither reliable nor trustworthy.[79]

The Mississippi Supreme Court observed initially that the Mississippi Workmen's Compensation Commission is not bound by common law or statutory rules of evidence and may conduct hearings in such a manner to best determine the rights of the parties.[80] The court noted that two considerations underlie the creation of exceptions to the general rule prohibiting hearsay evidence: "(1) a necessity for the exception, and (2) a circumstantial guaranty of the trustworthiness of the offered evidence."[81] The court found both of these considerations pre-

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ten evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." C. McCORMICK, *supra* note 69, § 246, at 584. The primary reason for excluding hearsay evidence is the lack of opportunity to test the truth of such evidence through cross-examination. *Id.* § 245 at 583.

[79] *Hercules*, 434 So. 2d at 725. The circuit court relied in part on Georgia-Pacific Corp. v. McLaurin, 370 So. 2d 1359 (Miss. 1979). There, the claimant had been allowed to introduce an unsworn report by a doctor although the doctor was neither present nor available for cross-examination. *Id.* at 1360. The *Georgia-Pacific* court held that the medical reports, consisting of letters written by the physician to the claimant's attorney, were not admissible in evidence. *Id.* at 1362; *cf.* Dunn, *supra* note 70, § 394.3, at 488 (written report of doctor inadmissible when doctor not present for cross-examination, except by agreement). The supreme court in *Hercules* distinguished *Georgia-Pacific*, noting that in *Georgia-Pacific*, "the physician was alive and could have been available for cross-examination; however, in this case the physician was dead at the time of the hearing, and of course, unavailable for cross-examination." *Hercules*, 434 So. 2d at 725-26.

[80] *Hercules*, 434 So. 2d at 736. The court referred to MISS. CODE ANN. § 71-3-55 (1972), which provides in part:

> (1) In making an investigation or inquiry or conducting a hearing, the commission shall not be bound by common law or statutory rules of evidence or by technical or formal rules or procedure, except as provided by this chapter, but may make such investigation or inquiry or conduct such hearing in such manner as best to ascertain the rights of the parties. Declarations of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and shall, if corroborated by other evidence, be sufficient to establish the injury.

Id.

See also Day Detectives, Inc. v. Savell, 291 So. 2d 716, 721 (Miss. 1974) (workers' compensation cases designed so that Commission can fully ascertain the rights of parties); Wells-Lamont Corp. v. Watkins, 247 Miss. 379, 386, 151 So. 2d 600, 603 (1963) (Commission permitted to make investigations or hold hearings to properly protect the rights of all parties).

[81] *Hercules*, 434 So. 2d at 727. *See also, e.g.*, Frazier v. Continental Oil Co., 568 F.2d 378, 382 (5th Cir. 1978) (danger inherent in hearsay obviated by necessity and trustworthiness); Matthews v. United States, 217 F.2d 409, 417 (5th Cir. 1954) (necessity and trustworthiness are rational justifications for exception to hearsay rule).

sent in *Hercules*. The death of Dr. Ross before the proceedings began and the unavailability of hospital records of the claimant's 1951 treatment satisfied the necessity consideration.[82] A circumstantial guaranty of the trustworthiness of the report was established by the testimony of a nurse who had participated in the 1951 events and by the fact that Dr. Ross' report had been kept as a business record in Hercules' files.[83] Thus, the court concluded, it was proper to admit the report as an exception to the hearsay rule.[84]

In State Farm Fire & Casualty Co. v. Magee, 368 So. 2d 230 (Miss. 1979), the Mississippi Supreme Court seemed to recognize that an exception to the hearsay rule may be allowed where the hearsay evidence is the only possible proof. The court held that an administrator's testimony of his efforts to determine the existence of an insurance policy covering his decedent was not hearsay, but that "[i]f some part of his testimony is argued to be hearsay, it falls within the exception," allowing hearsay when it is the only possible proof. *Id.* at 232.

[82] *Hercules*, 434 So. 2d at 727. The assistant director at the hospital where Dr. Ross had treated the claimant in 1951 had testified that no hospital records were available for the period before the last half of 1958. *Id.* at 724-25.

Pointing to this fact and Dr. Ross' death, the court stated: "The only method by which the contents of the report and the result of the 1951 x-ray could be proved was by admitting the report in evidence." *Id.* at 727. *Cf.* State Farm Fire & Casualty Co. v. Magee, 368 So. 2d 230, 232 (Miss. 1979) (acknowledging admissibility of hearsay where such evidence is the only possible proof).

[83] *Hercules*, 434 So. 2d at 727. The court appears to have accorded special significance to the nurse's testimony, for the opinion discusses it at some length:

> Hercules offered the testimony of Mrs. Cargill, who was not only first aid nurse for Hercules in 1951, but also Dr. Ross' personal nurse as well. She knew [claimant] Walters well, remembered the specific occasion when she carried Walters from Hercules to the Methodist Hospital Clinic, remembered hearing Walters state he had broken his wrist several years before he was employed by Hercules, identified Dr. Ross' signature on the report, and identified the daily first aid record on the date Walters came to the first aid station. On the issue of whether Dr. Ross verified the information on the report, she testified "Dr. Ross never signed a blank piece of paper for anybody. He signed it after it was filled out."

Id.

The court also stated that because it was kept as a business record by the company, Dr. Ross' report fell "within the well-established rule that business records may be admitted when kept in due course of a business." *Id.; see also* King v. Murdock Acceptance Corp., 222 So. 2d 393, 397-98 (Miss. 1969) (business records kept in due course of business are competent evidence); Grenada Cotton Compress Co. v. Atkinson, 94 Miss. 93, 100-01, 47 So. 644, 646 (1908) (extension of shop book rule to entries made in regular course of business).

[84] *Hercules*, 434 So. 2d at 727; *accord* Cascio v. Standard Oil Co., 32 So. 2d 66, 68 (La. Ct. App. 1947) (medical report by deceased company physician admissible in worker's compensation proceeding), *cited with approval in Hercules*, 434 So. 2d at 726; Cristofaro v. State Accident Ins. Fund, 527 P.2d 412, 413-14 (Or. Ct. App. 1974) (under

Since the admission of the deceased physician's report in *Hercules* was an "exception to the hearsay rule," the court noted that in future cases involving such reports, admission would require satisfaction of the necessity and trustworthiness test.[85] This requirement could indicate that the court intends for workers' compensation proceedings to adhere rather strictly to the general prohibition against consideration of hearsay evidence.[86] On the other hand, since the court relied on both the nurse's testimony and the business record doctrine without comment as to their relative weight,[87] and since it is unclear how much corroborative evidence will be required to satisfy the "trustworthiness" prong of the court's test, it could be inferred that the court intends for workers' compensation proceedings to be less restrictive of hearsay evidence. Thus, it will remain for future cases to determine whether *Hercules* broadens an agency fact-finder's discretion to consider matters that would be inadmissible in courts of law or holds administrative judges to evidentiary standards approximating those required of trial courts.

III. Open Meetings Law

In the last two decades, advocates of free and open access to information concerning governmental activities have successfully campaigned for "open meetings laws" in the states.[88] Open meetings laws

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statutory provision excepting worker's compensation from rules of evidence, deceased physician's report admissible to "achieve substantial justice"). *Compare* La. Rev. Stat. Ann. § 23:1317 (West 1978) (judge not bound by technical rules of evidence provided that all findings be based on competent evidence) *with* Miss. Code Ann. § 71-3-55 (1972) (same).

[85] *See Hercules*, 434 So. 2d at 727.

[86] Miss. Code Ann. § 71-3-55(1) (1972) specifically allows a type of hearsay evidence, the declarations of a deceased employee concerning the claimed injury, to establish the injury if corroborated by other evidence. The section also exempts worker's compensation proceedings from common law and statutory rules of evidence. *Id.; see also supra* note 69 and accompanying text. However, the Mississippi Supreme Court has found certain types of hearsay inadmissible in workers' compensation proceedings. *See* Georgia-Pacific Corp. v. McLaurin, 370 So. 2d 1359, 1360-62 (Miss. 1979) (doctor's unsworn report inadmissible except by agreement when doctor can be available to testify).

[87] *See Hercules*, 434 So. 2d at 727.

[88] *See*, Comment, *Open Meetings Laws: An Analysis and a Proposal*, 45 Miss. L.J. 1151, 1158 (1974) (from creation of Committee on Freedom of Information to 1973, 45 open meetings laws were enacted); *see also* D. O'Brien, The Public's Right to Know: The Supreme Court and the First Amendment 179-82 (1981) (list of states with open meetings and open records laws). Open meetings laws have been predicated on the public's "right to know." *See* Comment, *supra*, at 1159. However, the United States Supreme Court has rejected efforts to have constitutional status accorded to the so-called

generally give the public the right to attend meetings of governmental entities or to gain access to government documents.[89] Mississippi, being one of the last states in the nation to enact some form of right-to-know legislation,[90] adopted its Open Meetings Law in 1975.[91] The Act generally requires that official meetings of public bodies be conducted in public;[92] however, it also provides for the use of closed executive

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"right to know" under the first amendment. *See* Gannett Co. v. De Pasquale, 443 U.S. 368, 405 (1979) (Rehnquist, J., concurring)(first amendment does not provide public right of access to government information). *But cf.* Branzburg v. Hayes, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting) (right to know "crucial" to government by the people).

Scholars maintain that the right to know should be constitutionally protected. *See* D. O'BRIEN, *supra*, at 21 (right to know exists in penumbra of first amendment); Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1, 9 (1958) (freedom-of-speech and press clause of first amendment intended as guarantee of public's right to know).

[89] *See, e.g.*, ARK. STAT. ANN. §§ 12-2804 and -2805 (1979 & Supp. 1983) (public records and government meetings generally open to public); FLA. STAT. ANN. § 286.011(1) (West 1975 & Supp. 1984) (meetings of government entities generally open to public).

[90] *See* Comment, *supra* note 88, at 1151 (in 1974, Mississippi was one of four states without open meetings law).

[91] *See* MISS. CODE ANN. §§ 25-41-1 to -17 (Supp. 1983).

[92] *Id.* § 25-41-5. This requirement appears to be in furtherance of the broad legislative policy declared in the first section of the Act, encourgaging public awareness of the conduct of official business:

> It being essential to the fundamental philosophy of the American constitutional form of representative government and to the maintenance of a democratic society that public business be performed in an open and public manner, and that citizens be advised of and be aware of the performance of public officials and the deliberations and decisions that go into the making of public policy, it is hereby declared to be the policy of the State of Mississippi that the formation and determination of public policy is public business and shall be conducted at open meetings except as otherwise provided herein.

Id. § 25-41-1.

Such a declaration is generally recognized as a signal to the judiciary that the act is to be given a liberal construction to effectuate its purpose. *See* Laman v. McCord, 245 Ark. 401, 432 S.W.2d 753, 755 (1968) (liberal interpretation required to achieve declaration of intent); Miami Beach v. Berns, 245 So. 2d 38, 40 (Fla. 1971) (statute for public benefit given liberal interpretation in favor of public).

Two broad categories of governmental entities are included in the Mississippi Act's coverage: (i) executive and administrative boards, commissions, etc., of the state and its political subdivisions and municipalities, which are engaged in policy-making and are supported by or expend public funds; and (ii) legislative committees. *See* MISS. CODE ANN. § 25-41-3(a) (Supp. 1983); *see also infra* notes 100-102 (use of "functions" and "public funds" tests to determine coverage under sunshine laws). Various groups, including the judiciary, juries, law enforcement officials, and legislative subcommittees, are specifically excluded. MISS. CODE ANN. § 25-41-3(a) (Supp. 1983); *see* Comment, *supra* note 88, at 1164 (exceptions founded on determination that interests served by preserving

sessions under various circumstances.[93]

In 1983, the Mississippi Supreme Court had its first opportunity to construe the Open Meetings Law in *Mayor of Vicksburg v. Vicksburg Printing & Publishing Co.*[94]

The publisher of the *Vicksburg Evening Post* sought to enjoin the City of Vicksburg Planning Commission from holding meetings concerning the extension of municipal boundaries in closed executive session, contending that the executive session violated the Mississippi Open Meetings Law.[95] The Planning Commission argued that it was not subject to the Open Meetings Law because it was merely an advisory committee, lacking any final policy-making authority.[96] The Commission argued in the alternative that the meeting in question fell within the litigation exception to the Open Meetings Law because it reasonably anticipated litigation over the boundary extension under consideration.[97] The chancellor ruled that since there were no attorneys present at the meeting, the litigation exception did not apply, and enjoined the Planning Commission from holding further closed meetings.[98]

The Mississippi Supreme Court determined that the Planning Commission was a "public body" under the Open Meetings Law[99] since

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secrecy outweigh public's right to know).

[93] MISS. CODE ANN. § 25-41-7 (Supp. 1983). The statute lists 11 instances in which a public body is entitled to hold an executive session. *See id.* § 25-41-7(4). All meetings must begin as open meetings, and any motion to enter into executive session must be approved by three-fifths of the members present. *Id.* § 25-41-7(1). Such a vote may be taken in closed session, with the total vote recorded in the minutes. *Id.* § 25-41-7(2), (5).

[94] 434 So. 2d 1333, 1334 (Miss. 1983).

[95] *Id.* at 1334. The City of Vicksburg Planning Commission was created by the Mayor and Board of Aldermen in 1960. The Planning Commission is an advisory committee dealing with city planning, including considerations of proposed annexations.

The dispute concerned a May 25, 1982, meeting of the Commission called to discuss a preliminary draft of a study concerning a possible annexation by the city. Two reporters and a lawyer for the newspaper attended the meeting. The Commission decided to move into executive session, declaring that the meeting was for the purpose of considering matters that involved potential litigation. The newspaper filed for an injunction the following day. *Id.* at 1335.

[96] *Vicksburg*, at 434 So. 2d at 1337.

[97] *Id.* at 1338-39; *see* MISS. CODE ANN. § 25-41-7(4)(b) (Supp. 1983) (allowing executive sessions for strategy planning or negotiations regarding prospective litigation "when an open meeting would have a detrimental effect on the litigating position of the public body"); *see also infra* note 104 and accompanying text.

[98] *See Vicksburg*, 434 So. 2d at 1336, 1339. The chancellor required that litigation be "imminent" with "circumstances necessitating the presence of attorneys" as a prerequisite to invocation of the litigation exception. *Id.* at 1336.

[99] *Id.* at 1337. The court rejected as "disingenuous" a contention that the statutory

it performed important policy-making functions[100] and was supported by public funds.[101] The court concluded further that the statute reached meetings of advisory bodies, since no legislative intent to limit it to decision-making bodies could be discerned.[102]

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definition of "public body" did not embrace agencies and commissions of municipal corporations. *Id.; see* MISS. CODE ANN. § 25-41-3(a) (Supp. 1983) (defining "public body").

[100] *Vicksburg*, 434 So. 2d at 1338. Although the Planning Commission was not exclusively responsible for approving annexations, the court noted that it played an important role in the formulation of city policy. *Id.*

The Act's applicability to "policy-making entit[ies]," MISS. CODE ANN. § 25-41-3(a)(i) (Supp. 1983), is characteristic of open meetings laws whose coverage is limited to governmental entities performing particular functions. *See, e.g.*, ALA. CODE § 13A-14-2 (1975) (covers bodies performing legislative or judicial functions); OKLA. STAT. tit. 25 § 304(1) (Supp. 1983)(governing bodies).

It has been held that an agency clearly within the coverage of an open meetings law may establish a subordinate committee whose functions are so limited as to exempt the committee from the statute's coverage. *See* Sanders v. Benton, 579 P.2d 815, 821 (Okla. 1978)(open meetings law inapplicable because subordinate committee did not have authority to make decisions).

[101] *Vicksburg*, 434 So. 2d at 1337; *see* MISS. CODE ANN. § 25-41-3(a)(i) (Supp. 1983) (including support by or expenditure of public funds as a prerequisite for application of the Open Meetings Law to a body).

Open meetings laws frequently condition coverage on an agency's receipt or expenditure of public funds. *See, e.g.*, ILL. ANN. STAT. ch. 102, § 42 (Smith-Hurd Supp. 1982-83) (Illinois Open Meetings Act applicable to agencies supported with public monies).

The "public funds" and "functions" tests theoretically provide a wider scope of coverage than that achieved when a statute relies on a list of certain types of governmental organizations subject to the statute. Comment, *supra* note 88, at 1205. Thus, in James v. Board of Commissioners, 200 Colo. 28, 611 P.2d 976 (1980), the Colorado Supreme Court construed that state's Open Meetings Law not to apply to the Denver Urban Renewal Authority, since the statute only covered state agencies. *Id.* at 977; *see* COLO. REV. STAT. § 24-6-402 (1973)(only meetings of state agencies must be open to public). This was so, even though the authority, which had been created pursuant to state statute, expended public funds and formulated public policy. *James*, 611 P.2d at 977. Not surprisingly, this approach has been criticized as an unwarranted limitation on open-meeting requirements, because it uses a purely mechanical test to circumvent an open meetings law's philosophical underpinnings. *See* Comment, *supra* note 88, at 1205.

[102] *Vicksburg*, 434 So. 2d at 1337-38. The Planning Commission argued that "policy-making entit[ies]" referred only to agencies and commissions whose decisions were final and binding. The court rejected this construction, reasoning that the legislature would have expressly excluded advisory committees from the Act's coverage if it had so intended. *Id.* Indeed, the court construed the reference to discussions of matters over which a public body has "advisory powers" in the statute's definition of a covered "meeting" as an expression of legislative intent that advisory commissions may be subject to the Act. *Id.* at 1338 n.5; *see* MISS. CODE ANN. § 25-41-3(b) (Supp. 1983) (defining "meeting" for purposes of the Act).

Coverage of open meetings laws in other states has frequently been seen to extend to advisory committees or commissions with power to promulgate non-binding resolutions.

The Supreme Court reversed the chancellor's decision, however, on the ground that the meeting in question fell within the statute's litigation exception, which permits the use of closed executive sessions for meetings related to prospective litigation.[103] The court construed "prospective litigation" to mean "litigation reasonably likely to occur in the reasonably foreseeable future."[104] Observing that annexations

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See, e.g., Polillo v. Deane, 74 N.J. 562, 379 A.2d 211, 217 (1977) (commission established to propose improved form of city government was subject to open meetings law, even though the proposal was in no way binding); Syracuse United Neighbors v. Syracuse, 80 A.D. 2d 984, 437 N.Y.S.2d 466, 468 (N.Y. App. Div. 1981) (advisory board regarding disposition of abandoned property subject to sunshine law although committee had no governmental capacity and was advisory only); MFY Legal Servs., Inc. v. Toia, 93 Misc. 2d 147, 402 N.Y.S.2d 510, 512 (N.Y. Sup. Ct. 1977)(advisory committee, whose only purpose was to advise, subject to open meeting law). *But see* Washington School Dist. No. 6 v. Superior Court, 112 Ariz. 335, 541 P.2d 1137, 1140 (1975) (open meetings law excludes application of law to advisory committees); Idaho Water Resource Bd. v. Kramer, 97 Idaho 535, 548 P.2d 35, 72 (1976) (state water resource board committee not entrusted with policy formation not subject to sunshine law); People *ex rel.* Cooper v. Carlson, 28 Ill. App. 3d 569, 328 N.E.2d 675, 678 (1975) (voluntary subcommittee responsible for recommending zoning changes not subject to open meetings law); Sanders v. Benton, 579 P.2d 815, 817, 820-21 (Okla. 1978) (advisory committee organized to recommend sites to Department of Corrections not "governing body" under open meetings law).

[103] *Vicksburg*, 434 So. 2d at 1339; *see* MISS. CODE ANN. § 25-41-7(4)(b) (Supp. 1983) (setting out litigation exception).

Such an exception is a common feature of sunshine laws. *See* Note, 4 WM. MITCHELL L. REV. 250, 253 (1978)(collection of open meetings statutes containing litigation exceptions). Where a litigation exception is not expressly provided, courts have often created one as a necessary extension of the attorney-client privilege. *See, e.g.*, Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 263 Cal. App. 2d 41, 69 Cal. Rptr. 480, 492 (1968)(despite open meetings law, county boards of supervisors could confer privately with their attorneys in situations requiring confidentiality); Times Publishing Co. v. Williams, 222 So. 2d 470, 475-76 (Fla. 1969)(school board may hold closed meeting with attorney in situations where attorney's ethical obligation of confidentiality conflicts with statute); Minneapolis Star & Tribune Co. v. Housing & Redevelopment Auth., 310 Minn. 313, 251 N.W.2d 620, 625 (1976)(same); Oklahoma Assoc. of Mun. Attorneys v. State, 577 P.2d 1310, 1315 (Okla. 1978)(same). *But see* Laman v. McCord, 245 Ark. 401, 432 S.W.2d 753, 756 (1968) (court should not infer litigation exception).

[104] *Vicksburg*, 434 So. 2d at 1340. The *Vicksburg* court reversed the chancellor's conclusion that a meeting has to deal with "imminent" litigation in order to come within the exception. *Id.; accord* Sutter Sensible Planning, Inc. v. Sutter County Bd. of Supervisors, 122 Cal. App. 3d 813, 176 Cal. Rptr. 342, 349 (1981) (where members of board had a reasonable basis to infer an implied threat of litigation, board was justified in holding closed sessions); People *ex rel.* Hopf v. Barger, 30 Ill. App. 3d 525, 332 N.E.2d 649, 659-60 (1975) (prospective litigation given same confidentiality that is given pending litigation). In *Barger*, the Illinois court noted the distinction between prospective litigation and pending litigation. Litigation is pending when formal proceedings have begun. Any action taken with regard to the lawsuit prior to the start of formal proceedings is dealing with prospective litigation. 332 N.E.2d at 659. The California court in *Sutter* determined

cannot be confirmed without resort to judicial proceedings[105] and that a local property owners association's stated opposition to any annexation presented a credible threat of litigation,[106] the court concluded that the meeting related to prospective litigation and thus fell within the litigation exception.[107]

Thus, the court's initial construction of the Open Meetings Law was an expansive one. On the one hand, it construed the statute to embrace a wide spectrum of public bodies. So long as an agency, commission or other entity is involved in the formulation of policy, even in an advisory capacity, and is supported by or expends public funds, its meetings are subject to the Act's requirements.[108] Such a broad interpretation of the Act's coverage fulfills the stated policy of the Act: that the maintenance of a democratic society requires that citizens be advised and aware of the performance, deliberations, and decisions of public officials that go into the making of public policy.[109]

On the other hand, the court's construction of the litigation exception was also expansive. The case may well be seen to establish a *per se* exclusion of annexation proceedings from the mandatory provisions of the Act, even where no opposition is threatened.[110]

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that the avoidance of a lawsuit and ultimate expenditure of public funds was just as strong a basis for attorney-client confidentiality as the settlement or strategy of a lawsuit. 176 Cal. Rptr. at 348-49.

[105] *Vicksburg*, 434 So. 2d at 1338; *see* MISS. CODE ANN. §§ 21-1-27 to -33 (1972) (extension or contraction of corporate boundaries requires municipality to submit a petition in chancery court; notice and hearing must be afforded all interested and aggrieved parties; after hearing chancellor empowered to approve, deny or modify the proposed alteration).

[106] *Vicksburg*, 434 So. 2d at 1338. After opposing a similar annexation attempt in 1976, the Warren County Property Owners Association publicly announced their intention to oppose in court any extension of the Vicksburg city limits. *Id.* at 1335, 1338.

[107] *Id.* at 1338-39; *cf.* Sutter Sensible Planning, Inc. v. Sutter County Board of Supervisors, 122 Cal. App. 3d 813, 176 Cal. Rptr. 342, 349 (1981) (although no suit actually filed, board was justified in holding closed sessions where board had reasonable basis to infer an implied threat of litigation in statements made by a group which had a litigious history of opposing board actions).

The *Vicksburg* court reversed the chancellor's conclusion that the litigation exception applies only to meetings attended by counsel. Instead, it held that the presence of attorneys, while relevant to the inquiry, is not in itself determinative of whether the exception applies, and noted that strategy sessions regarding prospective litigation often are conducted in the absence of counsel. *Vicksburg*, 434 So. 2d at 1339.

[108] *See Vicksburg*, 434 So. 2d at 1337-38.

[109] *See* MISS. CODE ANN. § 25-41-1 (Supp. 1983).

[110] In finding that the Vicksburg Planning Commission's annexation discussions fell within the statutory litigation exception, the court stated broadly, "Annexation confirmation proceedings are 'litigation' within the meaning of Section 25-41-7(4)(b)." *Vicks-*

Surely the *Vicksburg* decision should not be viewed as allowing closed meetings under the litigation exception for any matter that is subject to judicial review. Such an interpretation would reduce the Open Meetings Law's salutary mandates to mere shibboleths.[111] Similarly, extension of the litigation exception to cover matters subject to federal preclearance under the Voting Rights Act,[112] would eliminate from the open meetings requirement proceedings that bear directly on one of the public's most fundamental rights—the right to vote.[113]

The *Vicksburg* decision need not be read so broadly, however. The court also relied on the threatened opposition of a property owners' group to annexation proposals as justification for the Planning Commission's use of executive session under the litigation exception.[114] It can fairly be argued that this factor limits the litigation exception to situations in which either (a) the matter in question is already in litigation, or (b) there is a credible threat of adversary litigation, rather than

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burg, 434 So. 2d at 1338-39.

Presumably, if *Vicksburg* does create a *per se* exclusion for meetings at which potential annexations are discussed, the same exclusion would seem to apply to meetings of public bodies where there was discussion of the potential incorporation of a municipality, since that action also requires a proceeding in chancery court. *See* MISS. CODE ANN. §§ 21-1-13 to -17 (1972) (requiring hearing for incorporation).

[111] Judicial review is available in circuit court over most decisions of county boards of supervisors and municipal authorities. *See* MISS. CODE ANN. § 11-51-75 (1972). Chancery courts have jurisdiction to hear, *inter alia*, objections to the issuance of county or municipal bonds, *id.*; suits to confirm title granted by political subdivisions, *id.* § 11-17-19; appeals from revocations of child care facility licenses by the State Board of Health, *id.* § 43-20-14; appeals from orders of the Marine Resources Commission, *id.* § 49-27-39 (Supp. 1983); and appeals from orders of the Public Service Commission, *id.* § 77-3-67 (1972 & Supp. 1983).

[112] 42 U.S.C. § 1973c (1982); *see infra* note 113.

[113] During the period 1977-1981, the Mississippi Legislature enacted 41 statutes that were expressly made dependent on preclearance under § 5 of the Voting Rights Act. These included laws dealing with legislative reapportionment, *e.g.*, Acts of April 21, 1978, 1978 Miss. Laws ch. 515, 535 (amending MISS. CODE ANN. §§ 5-1-1, -3 (Supp. 1983)); the regulation of political parties, *e.g.*, Act of March 14, 1979, 1979 Miss. Laws ch. 363 (amending MISS. CODE ANN. § 23-1-3 (Supp. 1983)).

Allowing the litigation exception of MISS. CODE ANN. § 25-41-7(4)(b) (Supp. 1983) to apply to discussions of any matter subject to federal preclearance under the Voting Rights Act could presumably have embraced legislative committee considerations of all these bills. Under the Open Meetings Law and subject to the exceptions of MISS. CODE ANN. § 25-41-7(4) (Supp. 1983), legislative committees are covered by the open meetings provisions, while subcommittees and conference committees are not. *See* MISS. CODE ANN. § 25-41-3(a) (Supp. 1983) (defining legislative committees as "public bodies" covered by Open Meetings Law).

[114] *See Vicksburg*, 434 So. 2d at 1338-39; *see also supra* note 106 and accompanying text.

a hypothetical one. Only in this way would a proper balance be achieved between the public's interest in and the declared state policy of open government[115] and government's legitimate interest in the confidentiality of matters subject to litigation.

Russell D. Holwadel

[115] *See* MISS. CODE ANN. § 25-41-1 (Supp. 1983).

CIVIL PROCEDURE

The Mississippi Supreme Court rendered thirty-six decisions in the area of civil procedure in 1983. This section will focus primarily on important decisions in the areas of appellate procedure and damages. Decisions handed down in the areas of appeal and error,[1] attorney's fees,[2] default,[3] peremptory instructions,[4] dismissal,[5] evidence,[6] expert

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[1] Protective Serv. Life Ins. Co. v. Carter, 445 So. 2d 215, 216 (Miss. 1983) (where law governing case on appeal is altered, amended or repealed, appellate court must decide case according to prior law); Adams v. Mark Oil, Inc., 431 So. 2d 489, 490-91 (Miss. 1983) (trial court's findings are not to be disturbed unless against overwhelming weight of evidence); Kemp v. Fern House, Inc., 424 So. 2d 564, 565 (Miss. 1983) (where both parties appeal judgment, cross-appellant is not to be deprived right to appeal because original appellant dismissed appeal).

[2] Magnolia Farm Servs., Inc. v. Tunica Oil Co., 438 So. 2d 285, 288 (Miss. 1983) (statute authorizing award of attorneys' fees in suit on open account is applicable only to suits where judgment on claim is actually rendered); Aeroglide Corp. v. Whitehead, 433 So. 2d 952, 953 (Miss. 1983) (trial court may not award damages for litigation expenses irretrievably lost due to mistrial necessitated by opposing counsel's improper conduct).

[3] Metts v. State Dept. of Pub. Welfare, 430 So. 2d 401, 404-05 (Miss. 1983) (default judgment in child support and paternity suit set aside when no harm resulted to child and when pleadings asserted adequate defense; venue for proceedings in county of defendant's residence).

[4] T.C.L., Inc. v. Lacoste, 431 So. 2d 918, 921 (Miss. 1983) (peremptory instruction that plaintiff entitled to actual damages was error since testimony was conflicting).

[5] Harris v. Fort Worth Steel & Mach. Co., 440 So. 2d 294, 295-96 (Miss. 1983) (dismissal of suit for failure to prosecute improper where, *inter alia*, plaintiff was not served with motion to dismiss).

[6] Winston v. Cannon, 430 So. 2d 413, 415 (Miss. 1983) (court did not err in refusing to admit physician's testimony where proponent had failed to supplement interrogatories as to identity and subject matter of expert's testimony); Tanner v. Hazlehurst Mun. Separate School Dist., 427 So. 2d 977, 979-80 (Miss. 1983) (since school board decision not to renew teacher's contract need not be for cause, whether decision was arbitrary is irrelevant, so long as decision was not based on improper motive); Culbreath v. Johnson, 427 So. 2d 705, 707-08 (Miss. 1983) (all evidence supporting lower court's findings of fact must be accepted and findings must be affirmed if supported by substantial evidence); Jackson v. Hazlehurst Mun. Separate School Dist., 427 So. 2d 134, 136-37 (Miss. 1983) (school board hearing on nonrenewal of teacher's contract is not subject to rules of evidence; school board's finding of insubordination is not arbitrary or capricious where possibility of insubordination is shown); Richardson v. Langley, 426 So. 2d 780, 783-86 (Miss. 1983) (chancellor's finding of incapacity to execute will, which must be based on clear and convincing evidence, reversed as contrary to overwhelming weight of evidence); Regan Equip. Co. v. Vaughn Gin Co., 425 So. 2d 1045, 1048-49 (Miss. 1983) (denying request to reopen case to introduce certificate error where neither prejudice nor delay would result; excluding testimony of witness who conferred with attorney after invoca-

witnesses,[7] instructions,[8] jurisdiction,[9] limitation of actions,[10] pleadings,[11] res judicata,[12] and miscellaneous subjects[13] warrant no textual treatment.

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tion of "the rule" was abuse of discretion; witness with twenty years' experience competent to testify to reasonableness of repair charges).

[7] Pharr v. Anderson, 436 So. 2d 1357, 1359-60 (Miss. 1983) (surgeon-pathologist was qualified as expert on family practitioners' standard of care in malpractice suit; judgment affirmed where amount of award indicated jury was not influenced by expert's speculative testimony concerning value of lost support).

[8] McWilliams v. Watkins, 430 So. 2d 854, 857 (Miss. 1983) (in defamation action, refusal of plaintiff's request for instruction defining elements of defendant's affirmative defense was error).

[9] *In re* K.A.R., 441 So. 2d 108, 109-10 (Miss. 1983) (youth court has jurisdiction over married minors; venue is proper only in judicial district in which minor resides or in which offense is committed); Cowan v. Ford Motor Co., 437 So. 2d 46, 47 (Miss. 1983) (declining to rule on question certified by Fifth Circuit regarding jurisdiction of Mississippi courts over personal injury suits brought by non-resident against foreign corporation qualified to do business in Mississippi); Temtex Prods., Inc. v. Brock, 433 So. 2d 942, 945 (Miss. 1983) (Tennessee court had *in personam* jurisdiction over Mississippi purchaser of goods sold by Tennessee seller suing for payment, where purchase orders were sent to Tennessee, economic consequences in Tennessee were foreseeable, and Tennessee was place of performance).

[10] City of Gulfport v. Saxton, 437 So. 2d 1215, 1218 (Miss. 1983) (terms of court are of no consequence where circuit court is sitting as appellate court); Illinois Cent. R.R. Co. v. Broadman, 431 So. 2d 1126, 1129-30 (Miss. 1983) (three-year statute of limitations on Federal Employers' Liability Act claim alleging continuing injury begins to run only when claimant's employment is terminated; judgment on verdict for FELA claimant reversed where instruction permitted jury to consider matters not in issue and verdict was contrary to weight of evidence); Chill v. Mississippi Hosp. Reimbursement Comm'n, 429 So. 2d 574, 585-86 (Miss. 1983) (claim filed after patient's death for reimbursement to state hospital for care and treatment was not waived where patient's guardian made modest periodic payments to hospital during patient's lifetime).

[11] Deposit Guar. Nat'l Bank v. Biglane, 427 So. 2d 945, 951-55 (Miss. 1983) (amendment of answer to raise statute of limitation is allowed where factual bases for amendment are matters of public record, so that no prejudice or surprise will be suffered; filing suit to set aside fraudulent conveyance in one county will not renew previous judgment rendered in another county against same defendants; request for oral argument before supreme court must be filed within 10 days after rebuttal brief is due).

[12] Smith v. Watson, 425 So. 2d 1030, 1033 (Miss. 1983) (child custody award obtained by father against mother is not binding or conclusive in subsequent habeas corpus proceeding against other relatives not parties to original suit).

[13] Allison v. State, 436 So. 2d 792, 797 (Miss. 1983) (attorney who perfects criminal defendant's appeal and then unilaterally withdraws from case for nonpayment of fees without seeking leave of supreme court, as required by MISS. SUP. CT. R. 40, is guilty of contempt).

I. Appeal and Error

A. Perfection of Appeals-Rule 48

Perhaps the most significant development in the area of appellate procedure during 1983 was the Mississippi Supreme Court's adoption of supreme court rule 48.[14] The rule was promulgated as an appendix to the court's *en banc* decision in *Moran v. Necaise*[15] and became effective January 1, 1984. It established a single procedure for perfecting appeals of right in both civil and criminal cases.[16]

Prior to *Moran,* appeals to the Mississippi Supreme Court could be taken in any of three ways:[17] first, by prepaying the costs of appeal in the lower court and the fee required by section 25-7-3;[18] second, by filing in the office of the supreme court clerk a transcript of the case from which appeal was taken;[19] or third, by filing a simple petition for appeal with the trial court clerk.[20] Whichever method was chosen, the appellant had to perfect the appeal within forty-five days[21] of rendition of the judgment[22] in order to confer appellate jurisdiction on the su-

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[14] Miss. Sup. Ct. R. 48(1).

[15] 437 So. 2d 1222, 1225-27 (Miss. 1983).

[16] Miss. Sup. Ct. R. 48(a).

[17] *See* Dixieland Food Stores, Inc. v. Kelly's Big Star, Inc., 384 So. 2d 1031, 1032-33 (Miss. 1980) (delineating the three methods of appeal to the Mississippi Supreme Court).

[18] Allgood v. Allgood, 367 So. 2d 450 (Miss. 1979). In *Allgood* the court construed recent amendments to § 11-51-25 of the Mississippi Code of 1972 to eliminate the filing of an appeal bond as an accepted method of taking an appeal and to require instead the prepayment of court costs, including transcript charges, and a $50 filing fee, to the trial court clerk. 367 So. 2d at 451.

[19] Miss. Code Ann. § 11-51-25 (1972 & Supp. 1983); *see also* Oswalt v. Austin, 192 Miss. 653, 655, 6 So. 2d 924, 924 (1942) (appeal taken when transcript filed with clerk of the supreme court).

[20] Miss. Code Ann. § 11-51-13 (1972); *see also* Miller v. Phipps, 152 Miss. 437, 440, 119 So. 170, 171 (1928) (filing of petition tolls statute of limitations); *cf.* Dixieland Food Stores, Inc. v. Kelly's Big Star, Inc., 384 So. 2d 1031, 1034 (Miss. 1980) (where petition for appeal filed and granted by clerk of trial court, appeal deemed taken when petition filed).

[21] *See* Miss. Code Ann. § 11-51-5 (Supp. 1983).

The time for taking an appeal was once two years after rendition of the judgment. Miss. Code § 3112 (1906) (current version at Miss. Code Ann. § 11-51-5 (Supp. 1983)). It was progressively shortened to one year, 1916 Miss. Laws ch. 222, § 1; then to six months, 1926 Miss. Laws ch. 153, § 1; then to 90 days, 1954 Miss. Laws ch. 214, § 1; and finally to 45 days, the present statutory limit. Miss. Code Ann. § 11-51-5 (Supp. 1983).

[22] An order or decree in chancery was " rendered" for purposes of appeal when it was signed by the chancellor and filed with the clerk of the court for entry. House v. Roberts, 254 So. 2d 904, 906 (Miss. 1971); Cresswell v. Cresswell, 164 Miss. 871, 879, 140

preme court.[23] This statutory scheme led to confusion since it was unclear whether the prepayment requirement was a jurisdictional prerequisite or merely a procedural rule. The latter would require a showing of prejudice to support dismissal.

In *Garrett v. Nix*,[24] the appellants filed a timely petition for appeal on November 25, 1981. Although the circuit clerk filed an estimate of costs on January 20, 1982, the appellants did not pay the estimated costs until September 3, 1982. The balance due on the actual cost was not paid until December 10, 1982, thirteen months after the original petition for appeal had been filed. Only then was the transcript of the record forwarded to the supreme court.[25]

The court determined that, while prepayment of costs in this case was not a prerequisite to jurisdiction,[26] the statute authorizing perfection by petition[27] included a procedural requirement that the appellant pay costs "as then required,"[28] and that this imposed on the appellant an affirmative burden to make reasonable efforts to ensure timely pay-

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So. 521, 522 (1932). Although at one time a judgment in circuit court was deemed rendered when it was orally pronounced at the conclusion of the trial, Johnson v. Mississippi Power Co., 189 Miss. 67, 71, 196 So. 642, 643 (1940), the rule governing orders and decrees in chancery was subsequently extended to circuit court judgments. Jackson v. Schwartz, 240 So. 2d 60, 62 (Miss. 1970). A judgment in circuit court was thereafter deemed rendered when it was signed by the judge and filed with the clerk or, if not signed, on the date it appeared on the court's minutes. *Id.* Presumably, this rule has been carried forward under rule 48, which refers to "the date of *entry* of the judgment, order or decree." MISS. SUP. CT. R. 48(b) (emphasis added).

[23] The court has repeatedly held that the time limits for perfecting appeals are jurisdictional and that an appellant's failure to comply with these limits is an absolute bar to an appeal. *See, e.g.*, Mississippi State Hwy. Comm'n v. First Methodist Church, 323 So. 2d 92, 95 (Miss. 1975) (time for perfecting appeal cannot be extended by supreme court or trial court); Shannon Chair Co. v. City of Houston, 295 So. 2d 753, 754-55 (Miss. 1970) (no jurisdiction unless statutory time period is met); Fisher v. Crowe, 289 So. 2d 921, 923 (Miss. 1970) (appellants carry burden of proving compliance); Oswalt v. Austin, 192 Miss. 653, 655, 6 So. 2d 924, 924 (1942) (failure to comply bars claim).

At one time the 10-day time limit for notifying a court reporter to transcribe the record of a case, *see* MISS. CODE ANN. § 9-13-33 (1972), was held to be jurisdictional and failure to comply barred the appellate court from considering the transcript. Mississippi State Hwy. Comm'n v. Brown, 250 Miss. 773, 777, 162 So. 2d 508, 509 (1964); McGee v. State, 203 Miss. 609, 611, 35 So. 2d 628, 628 (1948). This was overruled in Haralson v. State, 300 So. 2d 222, 223-24 (1975), where the court held that failure to comply with the 10-day limit was merely a procedural, and therefore waivable, defect. *Id.*

[24] 431 So. 2d 137 (Miss. 1983).

[25] *Id.* at 138.

[26] *Id.* at 139 (citing *Dixieland*, 384 So. 2d at 1034); *see supra* note 17.

[27] MISS. CODE ANN. § 11-51-15 (Supp. 1983).

[28] *Id.*

ment.[29] This included a duty to take necessary steps to compel the clerk's compliance with time limits on preparing an estimate of costs[30] as well as a duty to pay such costs immediately upon receipt of the cost bill.[31] Since the appellants had manifestly failed to comply with either of these procedural requirements, the court concluded that dismissal was warranted to avoid prejudice to the appellees.[32]

The court in *Moran v. Necaise*,[33] was again presented with an appellant who, having filed a timely petition for appeal, delayed paying court costs for several months. Although the petition for appeal was filed on October 22, 1982, the clerk's estimate of costs was not filed until January 27, 1983, in response to a writ of certiorari[34] issued a week earlier at the appellant's request. A second writ of certiorari was sought on May 13, 1983, to compel the circuit clerk and court reporter to prepare and certify the transcript. Meanwhile the appellee had moved to docket and dismiss.[35]

The court overruled the appellee's motion and granted the appellant's petition for certiorari.[36] In doing so, the court expressly declined to follow statutory guidelines or prior case law,[37] concluding that the availability of three distinct methods of appeal produced unnecessary confusion.[38] To eliminate this confusion and to promote judicial economy, the court announced, via Mississippi Supreme Court Rule 48, a

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[29] *Garrett*, 431 So. 2d at 139; *cf.* Hargraves v. Hamilton, 249 Miss. 117, 121, 161 So. 2d 179, 181 (properly perfected appeal dismissed where trial record not sent up to supreme court for three years after appeal taken), *cert. denied*, 377 U.S. 970 (1964).

[30] *Garrett*, 431 So. 2d at 139; *see* MISS. CODE ANN. § 11-51-61 (Supp. 1983) (clerk must estimate costs within five days from rendition of judgment).

The court has frequently held that, where the ability of an appellant to comply with statutory time limits depends on the timely compliance of a clerk or reporter with a statutory duty, the burden is on the appellant to petition for a writ of certiorari or otherwise move to compel the compliance of the clerk or reporter. *See Allgood*, 367 So. 2d at 452 (to compel clerk's production of estimated cost bill); *Hargraves*, 249 Miss. at 120, 161 So. 2d at 181 (to compel reporter's transcript); Oswalt v. Austin, 192 Miss. at 656, 6 So. 2d at 924 (1942) (where no petition was filed and where clerk failed to prepare record, appellant was required to petition for certiorari within time for perfecting appeal).

[31] *Garrett*, 431 So. 2d at 139.

[32] *Id.* at 140.

[33] 437 So. 2d 1222 (Miss. 1983).

[34] *See supra* note 30.

[35] *Moran*, 437 So. 2d at 1222-23.

[36] *Id.* at 1225. Concluding that all applicable statutes and prior case law should be overruled, the court did not make any specific findings as to the timeliness of the appellant's actions. *Id.; see infra* notes 37-39 and accompanying text.

[37] *Moran*, 437 So. 2d at 1225.

[38] *Id.*

single uniform appellate procedure. It should be noted that this announcement necessitated the abrogation of various statutes,[39] some of which were only recently enacted.

Rule 48 requires every appellant to file a notice of appeal with the clerk of the trial court within thirty days[40] after the entry[41] of judgment, order or decree from which the appeal is taken[42] or within thirty days of the entry of orders on any post-trial motions,[43] and to serve copies of such notice on all other parties and the court reporter.[44] Within the same time period, the appellant must also estimate the costs of preparing the record and deposit such sum with the trial court clerk.[45] If the clerk or the reporter is dissatisfied with the amount ten-

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[39] *Id.* In discarding the various statutes governing appellate procedure, the court relied on its inherent constitutional power, derived from MISS. CONST. art. VI, § 144 (vesting judicial power in courts) and identified in Newell v. State, 308 So. 2d 71, 76 (Miss. 1975), to promulgate procedural rules necessary to accomplish its constitutional purposes. *Moran*, 437 So. 2d at 1225; *see also* Glenn v. Herring, 415 So. 2d 695, 698 (Miss. 1982) (abrogating MISS. CODE ANN. § 11-1-7 is favor of MISS. SUP. CT. R. 47); Miss. Sup. Ct. Order of May 26, 1981, Miss. Cases 395-97 So. 2d 1, 1 (1981) (relying on *Newell* as authority for supreme court's promulgation of Mississippi Rules of Civil Procedure).

[40] *See supra* note 21.

[41] *See supra* note 22.

[42] MISS. SUP. CT. R. 48(b).

MISS. CODE ANN. § 11-51-5 (Supp. 1983) provides that where infants and persons of unsound mind defend an action, the time for perfecting an appeal does not begin to run until the disability has been removed. However, when such persons initiate suit or, as defendants, are represented by a guardian ad litem, appeal must be taken within two years. *Id.*

In *Moran*, the court expressly exempted these provisions from its general abrogation, 437 So. 2d at 1225, and carried them forward in Rule 48. *See* MISS. SUP. CT. R. 48(j).

[43] MISS. SUP. CT. R. 48(f),(g). Where post-trial motions under the Mississippi Rules of Civil Procedure have been filed, the 30-day period should operate as follows: (1) if any party has filed either a Rule 50(b) motion for judgment notwithstanding the verdict, a Rule 52(b) motion to amend the findings, or a Rule 59 motion to alter the judgment, the appeal period commences upon entry of the order denying the motion; (2) if any party has filed a Rule 59 motion for a new trial, the appeal period commences upon entry of the order granting or denying the motion. MISS. SUP. CT. R. 48(f).

Under the Uniform Criminal Rules of Circuit Court Practice, where post-trial motions for either a judgment of acquittal notwithstanding the verdict or a new trial have been filed, the 30-day period commences upon the denial of the motion or the date of sentencing, whichever is later. MISS. SUP. CT. R. 48(g).

[44] MISS. SUP. CT. R. 48(b). Once a timely notice has been filed, any other party may file a notice of appeal within 14 days thereafter or within the original 30-day period, whichever expires later. *Id.* 48(e).

[45] *Id.* 48(h)(1). Once this has been done, the appellant should immediately file a certificate of compliance and serve copies on all other parties and on the reporter. *Id.*

dered, either may apply to the trial court for an increase. After a hearing, if the trial court orders an increase in the amount deposited, the appellant has fourteen days to comply.[46]

Certainly, rule 48 will eliminate much of the confusion that has surrounded the various statutory requirements in the past. Presumably, both the notice of appeal and estimation of costs requirements remain jurisdictional in nature.[47] Many of the difficulties encountered in the past were traceable to delays in the submission of cost bills by court clerks. While the cases have consistently emphasized that the burden of ensuring timely submission of costs has been on the appellant,[48] the new procedure announced in rule 48 should reduce this problem significantly by requiring the appellant to estimate the costs of appeal and to pay according to his own estimate.[49] Certainly, there will continue to be difficulties as appellants, clerks, and court reporters dispute the actual sums involved, but here, too, the rule provides for a speedy resolution by the trial court and for prompt payment of any amounts found to be owing.[50] On balance, then, the new procedure appears far more conducive to expeditious appeals unencumbered by lengthy disputes over the adequacy of an appellant's efforts in perfecting his appeals than the prior statutory scheme.

B. Statutory Damages

In 1983 the Mississippi Supreme Court decided three cases dealing with the assessment of fifteen percent statutory damages against an unsuccessful appellant.[51] In *Lowicki v. Lowicki,*[52] the appellee made a

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If a criminal defendant has applied to the trial court clerk within the 30-day period for leave to appeal *in forma pauperis* and leave has been granted, he need not estimate and prepay costs. *Id.* 48(i); *cf.* Griffin v. Illinois, 351 U.S. 12, 18-19 (1956) (indigent criminal defendant entitled to free transcript on appeal); MISS. CODE ANN. § 99-35-105 (Supp. 1983) (appeal without cost for indigent criminal defendant on affidavit of inability to pay). If leave has been denied, the estimated costs must be deposited within 14 days thereafter. MISS. SUP. CT. R. 48(i).

[46] MISS. SUP. CT. R. 48(h)(2).

[47] *Id.* 48(b), (h). *See supra* note 23 and accompanying text.

[48] *See supra* note 30.

[49] *See* MISS. SUP. CT. R. 48(h)(1).

[50] *See id.* 48(h)(2).

[51] MISS. CODE ANN. § 11-3-23 (Supp. 1983). Under this section, statutory damages are assessed as follows:

> In case the judgment or decree of the court below be affirmed, or the appellant fails to prosecute his appeal to effect, the supreme court shall render judgment against the appellant for damages, at the rate of fifteen percent (15%), as follows: If the judgment or decree affirmed be for a sum of money, the damages

motion for the assessment of statutory damages[53] after the supreme court affirmed the lower court's divorce decree.[54] The court found that mandatory[55] statutory damages are applicable to unsuccessful appeals from divorce decrees.[56] However, because of the highly penal nature of the damages and the absence of legislative guidance, the court found that the statute should be strictly construed to prevent a windfall for the appellee.[57] In light of those considerations, the court determined that in domestic relations cases the fifteen percent assessment should be applied to decrees for definite sums of money and for the possession of property at issue where immediate performance is contemplated or where a delay in performance is beneficial to the appellant.[58] Finally,

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shall be upon such sum. If the judgment or decree be for the possession of real or personal property, the damages shall be assessed on the value of the property.

Id.

For a discussion of Mississippi's statutory damages provision and the constitutional problems inherent therein see Comment, *Mandatory Assessment of Damages Against an Unsuccessful Appellant: A Constitutional Analysis*, 53 MISS. L.J. 281 (1983).

[52] 429 So. 2d 917 (Miss. 1983).

[53] *Id.* at 918.

[54] 425 So. 2d 1361 (Miss. 1983). Mrs. Lowicki's six-part recovery included periodic-payment alimony, lump-sum alimony payable in annual installments over a 10-year period, child support, possession of the home, a lump-sum payment to be used for the purchase of an automobile and payment of legal expenses. 429 So. 2d at 918.

[55] *See* Hart v. Catoe, 393 So. 2d 1346, 1347 (Miss. 1981) (award of statutory damages in suit to cancel claims to real estate mandatory); Chrismond v. Chrismond, 213 Miss. 189, 193, 56 So. 2d 482, 484 (1952) (assessment of statutory damages mandatory in award of real property to putative wife where marriage held void).

[56] 429 So. 2d at 919. Because nothing in the statute suggested that application of statutory damages should be excluded in domestic relations cases, the court held that the term "decree" in § 11-3-23 included divorce decrees. 429 So. 2d at 919. Furthermore, the court had assessed statutory damages in past domestic relations cases. *Id.; see* Beam v. Beam, 276 So. 2d 658, 660 (Miss. 1973) (statutory damages assessed against husband who attacked form of divorce decree); *Chrismond*, 213 Miss. at 193, 56 So. 2d at 484 (award of statutory damages allowed where annulment granted).

[57] 429 So. 2d at 919; *see also* McKendrick v. Lyle Cashion Co., 234 Miss. 325, 340, 106 So. 2d 509, 511 (1958) (strict construction due to penal nature of statute precluded assessment of statutory damages where appellant asserted claim to an interest in wells as opposed to possession of property); M.T. Reed Construction Co. v. Martin, 215 Miss. 472, 481, 63 So. 2d 528, 531-32 (1953) (strict construction prevented application of statutory damages to workmen's compensation cases unless judgment awarded was a fixed sum).

[58] 429 So. 2d at 919-20. In applying this rule the court determined that the lump-sum alimony payable over 10 years, the single payments for a new car and legal expenses, and the possession of the home should be augmented by the 15 percent statutory damage award. The 15 percent applied to the lump sum was to be payable annually with each installment. The court took note of the tax benefit available to the appellant by ex-

the court issued an invitation for legislative guidance in deference to the legislature's "paramount authority" on statutory damages.[59]

Statutory damages were applied to the amount of recognized liens in *Peoples Bank and Trust Co. v. L & T Developers, Inc.*[60] The court, on consideration of an appeal by a construction lender, upheld the validity and priority of the liens of the materialmen and contractor over those of the lender and the cross-appellant landowner.[61] Subsequently, the cross-appellant filed a motion for assessment of statutory damages.[62] The lender claimed that statutory damages should not apply because the controversy did not concern a claim to particular property.[63] The court found that the challenge represented a dispute as to some particular land since the appellee's interest in the property would have terminated had the lender succeeded on appeal.[64] The bank further claimed that since the appellee was unsuccessful on its cross-appeal, no statutory damages could be awarded.[65] The court rejected this

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tending the lump sum payment beyond a 10-year period. *Id.* at 920 n.1. Payment of a principal sum over a period of more than 10 years may be treated as deductible periodic payments to the extent of 10 percent of the lump sum. 26 U.S.C. § 71(c)(2) (1976).

Statutory damages were not applied to the periodic payments of alimony and child support because such payments were on a monthly basis over a substantial period of time. 429 So. 2d at 920.

[59] 429 So. 2d at 920. Until such legislative consideration is provided, mandatory statutory damages will be applied in domestic relations cases as set forth in *Lowicki*. *Id.*

[60] 437 So. 2d 7 (Miss. 1983).

[61] 434 So. 2d 699, 714-15 (Miss. 1983). The priority established for the perfected liens was as follows:

(1) Materialmen and construction lienors;
(2) the appellee (cross-appellant);
(3) the appellant banks.

Id.

[62] 437 So. 2d at 9. The materialmen and construction lienors also filed motions for assessment of statutory damages which were sustained on July 13, 1983 without opinion. *Id.* at 9 n.1.

[63] *Id.* at 9-10. The banks' contention was that their claim was instead a challenge of lien validity and priority. *Id.* MISS. CODE ANN. § 11-3-23 (Supp. 1983) requires that 15 percent statutory damages be assessed to the value of property "[i]f the judgment or decree . . . be a judgment or decree . . . to enforce or establish a lien or charge or claim upon some interest in property, and the only matter complained of on the appeal is the decree as to some particular property or claim on it . . . ." *Id.*

[64] 437 So. 2d at 10. One bank challenged the validity of the appellee's lien, while the other bank asserted its priority over the appellee. Success of either claim would have caused the appellees to have "walked away from this litigation empty handed." *Id.* Since the only matter complained of was the decree regarding a claim to particular property, the claims on appeal did come within the meaning of MISS. CODE ANN.§ 11-3-23 (Supp. 1983). 437 So. 2d at 10.

[65] 437 So. 2d at 10. The appellee's cross-appeal challenged the trial court's determi-

argument on the grounds that statutory damages had heretofore been assessed against the party who initiated an appeal irrespective of the resolution of a cross-appeal.[66] The fifteen percent assessment was applied to "present value" rather than value as of the date of the decree due to the difficulty in determining value at a prior date and due to the probability that the realty had appreciated in value.[67]

In *Walters v. Inexco Oil Co.*[68] the supreme court accepted a certified question pursuant to Mississippi Supreme Court Rule 46 from the

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nation that the materialmen and construction lienors received first priority while they were granted only second priority. *Id.* The materialmen and construction lienors were granted priority over the appellee landowner since, in supplying labor and materials to the project, they enhanced the value of the land. The appellee landowner made no such contribution and had a greater capacity to protect his interest. Furthermore, the landowner would benefit from a successful development to which the materialmen and construction lienors substantially contribute. 434 So. 2d at 714.

[66] 437 So. 2d at 10. The litigant who first initiated the appeal was subject to statutory damages since the statute requires the supreme court to assess damages against the appellant. *Id.; see also* Housing Authority of City of Gulfport v. Barbee, 283 So. 2d 591, 592 (Miss. 1973) (unsuccessful cross-appellant awarded statutory damages because appellant first took advantage of the appellate process); *cf.* Pearce v. Ford Motor Co., 235 So. 2d 281, 283 (Miss. 1970) (unsuccessful appellant must pay statutory damages without reference to whether judgment at trial was for or against appellant).

The banks also argued that their alternatives, paying the appellee's lien or selling the property to satisfy the appellee's claim, placed conditions on affirmance and that statutory damages do not apply unless the affirmance is unconditional. 437 So. 2d at 11; *accord* Shivers v. Biloxi-Gulfport Daily Herald, 236 Miss. 303, 311, 110 So. 2d 359, 363 (1959) (statutory damages not allowed where denial of workmen's compensation award was reversed); Ford v. Commercial Sec. Co., 220 Miss. 157, 166, 72 So. 2d 201, 201 (1954) (statutory damages not allowed where remittitur ordered since it has practical effect of reversal); Shipman v. Lovelace, 215 Miss. 141, 144-45, 60 So. 2d 559, 560-61 (1952) (clerk erred in awarding statutory damages where lower court decree was not unconditionally affirmed); Comment, *Mandatory Assessment of Damages Against an Unsuccessful Appellant: A Constitutional Analysis,* 53 MISS. L.J. 281, 286 (1983) (appellee ineligible for statutory damages upon modification of judgment). This argument was rejected since those alternatives were noted in the chancery court's final decree and then unconditionally affirmed on appeal. 437 So. 2d at 11.

[67] 437 So. 2d at 12 n.4. The damages should be based on the value of the property or interest in the property when the property value or interest in the property is less than the judgment. However, if the value of the property or interest in the property is greater than the judgment, the damages should be based upon the amount of the judgment. MISS. CODE ANN. § 11-3-23 (Supp. 1983). Consequently, the case was remanded to determine present value. 437 So. 2d at 12.

[68] 440 So. 2d 268 (Miss. 1983). The plaintiffs filed suit in United States District Court for the Southern District of Mississippi to recover damages for personal injuries sustained in an explosion that occurred on premises leased by the defendant. A judgment for the plaintiff was affirmed on appeal, however, the issue regarding the statutory penalty was reserved. *Id.*

United States Court of Appeals for the Fifth Circuit asking whether statutory damages must be applied by a federal court sitting in diversity.[69] In addressing the certified question the court first outlined the rationale behind the assessment of statutory damages as discouraging frivolous appeals and providing compensation for successful appellees.[70] Because of the mandatory language in the penalty statute,[71] statutory damages would have been assessed against the defendant had the case been tried in the state judicial system.[72] The court, therefore, reasoned that statutory damages should be assessed to avoid the inequitable results of forum shopping.[73]

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[69] *Id.* at 270. The court noted that although the question appeared to be open, ultimately it was a matter of federal law turning upon the federal court's interpretation of the Federal Rules of Decision Act, ch. 646, 62 Stat. 944 (1948) (current version at 28 U.S.C. § 1652 (1976)). 440 So. 2d at 272. After a discussion of Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) and its progeny, the court stated:

> Precisely what the *Erie* rule means today we do not pretend to know. [Footnote omitted] The blunt substantive-procedural distinction has proved unsatisfactory in all except the simplest of cases. [Footnote omitted] What is clear, however, is that *the question whether the Mississippi penalty statute should be applied in this case is a pure Erie question.*

440 So. 2d at 273-74.

A second certified question was also accepted asking whether the amended 15 percent figure should be substituted for the 5 percent statutory damages assessment provided under the statute prior to July 1, 1980. *Id.* at 277. The court held that because the trial court's judgment was rendered prior to the effective date of the amendment, July 1, 1980, the 5 percent figure should apply. *Id.* at 277-78; *see also*, Deas v. Andrews, 411 So. 2d 1286, 1294 (Miss. 1982) (amended statute increasing damages does not apply to judgment entered prior to effective date).

[70] 440 So. 2d at 274. A denial of use of funds, as the plaintiff claimed, was not among the goals the statute was designed to promote. That interest has been protected by Miss. Code Ann. § 75-17-7 (Supp. 1983) which provides that all judgments bear the legal rate of interest from the date of rendition. 440 So. 2d at 275.

The statute should also protect the appellate system from an overly burdensome caseload and direct litigants' attention to the importance of the trial. *Id.* at 275.

[71] *See supra* notes 51, 55 and acccompanying text.

[72] 440 So. 2d at 275. The court stated:

> (a) if the judgments rendered May 2, 1979 . . . had been rendered by any circuit court in this state . . .; and
>
> (b) if the appeal in fact taken in this case to the United States Court of Appeals for the Fifth Circuit had been taken to this Court; and
>
> (c) if, as did the Court of Appeals . . . we had unconditionally affirmed, then upon proper and timely motion, we would under the authority of Section 11-3-23 have assessed the penalty on each judgment and against Inexco.

440 So. 2d at 276.

[73] *Id.* Because this action could have been brought in either state circuit court or federal district court, those courts were held to be in equivalent positions. Consequently, the Mississippi Supreme Court and the United States Court of Appeals, appellate courts

C. Section 147 of the Mississippi Constitution

On two occasions during 1983 the Mississippi Supreme Court was faced with deciding whether section 147 of the Mississippi Constitution would preclude reversal of decisions rendered in the wrong state court.[74] In *Penrod Drilling Co. v. Bounds*[75] the plaintiff filed a complaint under the Jones Act[76] in chancery court.[77] The plaintiff and defendant agreed by decree to release garnishee defendants named in the suit.[78] Trial was had in chancery court and a verdict returned for the plaintiff.[79] On appeal the defendant's claim of lack of jurisdiction because of the unconstitutionality of the attachment statutes[80] was found to be untenable since by agreement all attachment issues had been dropped and the defendant had voluntarily entered an appearance and agreed not to remove the case.[81] Such actions placed the parties in the

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to which direct appeals as of right would be made, were also considered to be equivalent. Because the Mississippi Supreme Court would have been bound to apply a statutory penalty, the failure of the United States Court of Appeals to so apply the penalty would have adversely affected the state's interest in preventing forum shopping and defeated the goals of *Erie*. *Id.*

[74] MISS. CONST. art. VI, § 147 states:

> No judgment or decree in any chancery or circuit court rendered in a civil cause shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common law jurisdiction . . . .

[75] 433 So. 2d 916 (Miss. 1983).

[76] 46 U.S.C. § 688 (1976).

[77] 433 So. 2d at 917. The plaintiff fixed jurisdiction in chancery court by naming eight national oil companies doing business in Mississippi as garnishee defendants. Each garnishee defendant was alleged to be indebted to the defendant or to have property of the defendant in its possession. *Id.*

[78] *Id.* Both parties appeared in chancery court and moved to dismiss the action against the garnishee defendants. The agreement decree submitted by both parties and entered by the court noted the defendant's appearance, but reserved the defendant's right to challenge subject matter jurisdiction. *Id.* at 917-18.

[79] *Id.* at 918.

[80] *Id. See* M P I, Inc. v. McCullough, 463 F. Supp. 887, 901 (N.D. Miss. 1978) (chancery attachment of nonresident debtor violative of due process clause of fourteenth amendments); Mississippi Chem. Corp. v. Chemical Constr. Corp., 444 F. Supp. 925, 938 (S.D. Miss. 1977) (chancery attachment statutes which do not provide notice, opportunity for hearing or other safeguards to minimize risk of loss violate procedural due process). Subsequent to these decisions, the Mississippi Legislature altered the chancery attachment procedure to cure the deficiencies outlined in those cases. *See* MISS. CODE ANN. §§ 11-21-2, -3, -5, -9 (Supp. 1983).

[81] 433 So. 2d at 922. The defendant could have challenged the attachment procedure and was not required to make an appearance. The defendant, however, chose not to so challenge and chose to make an appearance. *Id.*

same position as if the suit had been filed in chancery court absent an attachment proceeding.[82] The court refused to overturn the decision on the basis of the defendant's assertion that suit was filed in the wrong court, and it held that section 147 precluded reversal where the only error was filing an action at law in chancery court.[83]

In *Thompson v. First Miss. Nat'l Bank*[84] the court found an error other than jurisdiction within the meaning of section 147. In *Thompson* the defendant filed a pretrial motion to transfer to chancery court for an accounting.[85] The circuit court transferred the case, including the issue of punitive damages.[86] After the plaintiff failed to file pleadings in chancery court, the suit was dismissed.[87] On appeal, the transfer order was found to be erroneous since chancery courts at that time did not have the power to award punitive damages.[88]

Two additional factors supported reversal: first, the plaintiff was denied a substantive right to litigate the claim for punitive damages;[89]

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[82] *Id.* The action could have been transferred, but after the defendant made a voluntary appearance and agreed not to remove, the only remaining question was whether the chancellor had authority to decide the plaintiff's claim under the Jones Act. *Id.*

[83] *Id.* at 923. Erroneously filing a common law suit in chancery has been held not to support dismissal or reversal. *See, e.g.*, Robertson v. Evans, 400 So. 2d 1214, 1215 (Miss. 1981) (denial of interlocutory appeal from motion to dismiss for lack of jurisdiction in chancery based on mandate of § 147); McLean v. Green, 352 So. 2d 1312, 1314 (Miss. 1977) (absent error other than assumption of jurisdiction by chancellor of a common law action no reversal granted); Mathews v. Thompson, 231 Miss. 258, 290-91, 95 So. 2d 438, 452 (1957) (error of chancery court in assuming jurisdiction immaterial since § 147 precluded reversal for lack of jurisdiction); Boyett v. Boyett, 152 Miss. 201, 208, 119 So. 299, 301 (1928) (want of jurisdiction in a civil case alone held not grounds for reversal).

[84] 427 So. 2d 973 (Miss. 1983). Plaintiff and her husband obtained a loan from the defendant bank which was covered by a credit life insurance policy issued by defendant insurance company. *Id.* at 974. When the plaintiff's husband died the insurance company refused to honor the policy. *Id.* Plaintiff claimed that she had paid a sufficient sum to keep the policy in force, the insurance company was obligated to insure her husband's life and, in the alternative, the bank was obligated to procure such life insurance. *Id.*

[85] *Id.* at 974-75. Pursuant to MISS. CONST. art. VI, § 161, the defendant asserted that since the case involved a complicated accounting beyond the knowledge of the average juror, the case could be transferred to chancery court. 427 So. 2d at 974-75.

[86] 427 So. 2d at 975.

[87] *Id.* MISS. CODE ANN. § 11-1-39 (1972) requires the plaintiff to file a complaint in the court to which the case is transferred within 30 days of the deposit of papers in the transferee court.

[88] 427 So. 2d at 975. The case was decided several weeks prior to Tideway Oil Programs, Inc. v. Serio, 431 So. 2d 454 (Miss. 1983), which changed the long-standing rule that chancery cannot award punitive damages. For a discussion of *Tideway Oil Programs, Inc.*, see *infra* notes 91 through 102 and accompanying text.

[89] 427 So. 2d at 976; *see also* Warner v. Hogin, 148 Miss. 562, 567, 114 So. 347, 348 (1927) (appellant entitled to reversal where erroneous exercise of jurisdiction deprives

second, since the case was dismissed upon the plaintiff's failure to file pleadings in chancery court, the case had not been tried on its merits.[90]

II. DAMAGES

The Mississippi Supreme Court abandoned the rule precluding an award of punitive damages in chancery court in *Tideway Oil Programs, Inc. v. Serio*.[91] Previously, Mississippi had aligned itself with the traditional approach and viewed equity as a court of conscience rather than a forum for vengeance.[92] Therefore, the function of equity in Mississippi had been solely to make actual compensation.

In *Tideway*, the plaintiff class filed a complaint which charged the defendant with breach of fiduciary duty and fraud.[93] The plaintiff requested, inter alia, actual and punitive damages.[94] In overturning the rule[95] that a plaintiff could not recover punitive damages in chancery, the *Tideway* court first observed the rationale behind an award of punitive damages. The court found that such an award is designed to punish the transgressor, deter others from similar conduct,[96] and re-

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him of substantial right).

[90] 427 So. 2d at 976. Section 147 was adopted primarily to prevent reversal where the parties have put forth the time, effort and expense of fully litigating the issues and later have to relitigate the same issues only because the matter was brought before the wrong court. Therefore, the policy prohibiting reversal has much less force where no trial on the merits has taken place. *Id.*

[91] 431 So. 2d 454 (Miss. 1983). This decision was noted in 53 MISS. L.J. 521 (1983).

[92] 431 So. 2d at 461. *See* Wilborn v. Balfour, 218 Miss. 791, 793, 67 So. 2d 657, 657-58 (1953) (Mississippi has never allowed punitive damage awards in chancery). *See generally* 48 A.L.R. 2d 947, 947-64 (1956) (discussions of power of equity courts in various jurisdictions to award punitive damages).

[93] 431 So. 2d at 455. The complaint alleged that the fiduciary relationship came about as a result of a joint venture between the plaintiff class and the defendants. *Id.* The plaintiff maintained that pursuant to this relationship, the defendants were under a duty to convey interest in certain oil and gas leases on property adjacent to property the plaintiffs and defendants held as co-tenants. *Id.* at 455-56.

[94] *Id.* at 459. The complaint also sought to compel execution of certain assignments, temporary and permanent injunctive relief, and an accounting. *Id.* at 456, 459.

[95] *See, e.g.*, Capital Electric Power Ass'n v. McGuffee, 226 Miss. 227, 246, 83 So. 2d 837, 844 (1955) (chancery court has no power to award punitive damages).

[96] 431 So. 2d at 460; *see also* Standard Life Ins. Co. v. Veal, 354 So. 2d 239, 247 (Miss. 1977) (assessment of punitive damages provided warning to others and should be applied with caution); West Bros., Inc. v. Barefield, 239 Miss. 530, 542, 124 So. 2d 474, 480 (1960) (exemplary damages punish defendant and warn others not to commit like offenses); Yazoo & Miss. Valley R.R. Co. v. May, 104 Miss. 422, 426, 61 So. 449, 450 (1913) (unlike compensatory damages, punitive damages serve as punishment for wrongdoing and as a deterrent to others from commission of such acts).

ward the plaintiff for making the defendant account for his misdeed.[97]

The court, however, found that the underlying logic supporting the traditional prohibition of punitive damages in chancery had been based upon a misunderstanding of two earlier Mississippi cases, *Hines v. Imperial Naval Stores Co.*[98] and *Neal v. Newburger Co.*[99] Both cases had been cited as supporting the proposition that where a party seeks relief in equity, all claims to punitive damages are waived.[100] Instead, the *Tideway* court held these cases to indicate that the power to award punitive damages might be within the chancellor's discretion.[101] The court further held that because fraud, traditionally within the jurisdiction of chancery courts, has long been an accepted ground for awarding punitive damages, a chancellor should have the power to award such damages.[102]

III. Mississippi Rules of Civil Procedure

Although the Mississippi Rules of Civil Procedure became effective on January 1, 1982,[103] most cases considered by the supreme court in 1983 were originally filed prior to the effective date. Therefore, no

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[97] 431 So. 2d at 460 n.1. Rewarding public-spirited citizens has been viewed as a policy underlying an award of punitive damages. Although recently not all plaintiffs demanding punitive damages have been moved by public service, the guidelines for such an award should be changed to insure that only genuinely public-spirited citizens are awarded punitive damages. *Id.; see also* Neal v. Newburger, 154 Miss. 691, 700, 123 So. 861, 863 (1929) (exemplary damages are punitive in nature and are awarded for bringing a wrong-doer to account for his conduct).

[98] 101 Miss. 802, 58 So. 650 (1911).

[99] 154 Miss. 691, 123 So. 861 (1929).

[100] 431 So. 2d at 462-63. The misunderstanding was traced to Monsanto Co. v. Cochran, 254 Miss. 399, 180 So. 2d 624 (1965) which cited both *Hines* and *Neal* as standing for the proposition that a litigant seeking equitable relief waives all claims to punitive damages. *Id.* at 405, 180 So. 2d at 626.

[101] 431 So. 2d at 462-63. In both *Hines* and *Neal*, the chancellor's denial of punitive damages was upheld. However, the basis for upholding the denial was that the chancellor had not abused his discretion in denying punitive damages, and not that a chancellor has no power to award punitive damages. *See Neal*, 154 Miss. at 701, 123 So. at 864; *Hines*, 101 Miss. at 806, 58 So. at 651. The court in *Monsanto* also cited Annot., A.L.R.2d 947, 958 (1956), in support of the theory that punitive damages are not awarded in Mississippi chancery courts. *Monsanto*, 254 Miss. at 405, 180 So. 2d at 626. However, the annotation listed Mississippi as a doubtful jurisdiction on the question whether equity may award punitive damages. 48 A.L.R.2d at 958-59.

[102] 431 So. 2d at 461. The court held that a sanction appropriate at law should be extended to equity and that chancery courts should not be denied the power to grant any type relief supported by public policy. *Id.* at 460.

[103] Miss. Sup. Ct. Order of May 26, 1981, Miss. Cases 395-97 So. 2d 1, 1 (1981).

significant interpretations of any of the new rules were handed down in 1983. While the old rules of pleading and practice continued to apply to cases filed before January 1, 1982,[104] several 1983 opinions were indicative of the changes contemplated under the new rules of civil procedure.

In *Witt v. Mitchell*[105] the court, for the second time in as many years,[106] reversed a lower court's judgment holding section 91-1-15 of the Mississippi Code of 1972 unconstitutional,[107] on the ground that the constitutional question had not been specifically pleaded.[108] Justice

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[104] Witt v. Mitchell, 437 So. 2d 63, 67 (Miss. 1983) (Robertson, J., concurring); *cf.* Protective Serv. Life Ins. Co. v. Carter, 445 So. 2d 215, 216 (Miss. 1983) (where law governing case on which appeal is pending is altered, amended or repealed, appellate court is to decide case according to prior law).

[105] 437 So. 2d 63 (Miss. 1983).

[106] *See* Estate of Miller v. Miller, 409 So. 2d 715 (Miss. 1982) (constitutionality of statute must be specifically pleaded).

[107] 437 So. 2d at 66. Before 1981, MISS. CODE ANN. § 91-1-15 (1972) provided only for an illegitimate child's inheritance from an intestate father if the father married the mother and acknowledged the child as his. Alternatively, inheritance rights could be established through a paternity suit, if at the time of the suit the father was alive and unmarried. MISS. CODE ANN. § 93-9-29(5) (1972).

In 1977, the United States Supreme Court ruled that states could not constitutionally bar illegitimates from inheriting from their intestate fathers. Trimble v. Gordon, 430 U.S. 762, 772 (1977). In 1981, the Mississippi Legislature substantially expanded the circumstances under which illegitimates could inherit from their intestate fathers. MISS. CODE ANN. § 91-1-15 (Supp. 1983). *See generally* Comment, *Paternal Inheritance Rights of Illegitimates Under Mississippi Law: Greater than Equal Protection?* 53 MISS. L.J. 303, 310-18 (1983) (comparing 1981 amendment with constitutional standards).

[108] *Witt*, 437 So. 2d at 66.

In *Estate of Miller v. Miller*, Justice Roy Noble Lee, writing for the court, gave this rule one of the more colorful expositions of any point of law in the state's reports: "The parties, in their pleadings, should have hit the issues of illegitimacy, unconstitutionality, and statute of limitations head on like two wild rams during the mating season. Instead, they danced, bobbed and weaved like boxers in the ring, skirting those questions." 409 So. 2d at 717; *see also* State v. Cabana Terrace, Inc., 247 Miss. 26, 37, 153 So. 2d 257, 260 (1963) (constitutionality of statute must be specifically pleaded to be considered); Comfort v. Landrum, 52 So. 2d 658, 659 (Miss. 1951) (constitutional issue cannot be raised for first time on appeal); Adams v. Bd. of Supervisors, 177 Miss. 403, 414, 170 So. 684, 685 (1936) (same); V. GRIFFITH, MISSISSIPPI CHANCERY PRACTICE § 564 (2d ed. 1950) (allegations of pleadings and proof of facts must correspond); *cf.* Lucas v. Lucas, 415 So. 2d 709, 711-12 (Miss. 1982) (error for chancellor in adoption proceeding to adjudicate other issues, such as child support and visitation rights).

Apparently in response to a 1983 amendment making the 1981 amendment to § 91-1-15 apply retroactively as a new remedy for illegitimates, MISS. CODE ANN. § 91-1-15(1) (Supp. 1983), the court remanded *Witt v. Mitchell* to the chancery court to permit the parties to amend their pleadings and begin the entire case anew. 437 So. 2d at 66 n.1.

Robertson observed in a separate concurrence that, under rule 8,[109] the plaintiff's complaint would have been adequate to raise the constitutional issue.[110] Finally, in *Litten v. Grenada County*,[111] a case filed on December 21, 1981, a grant of summary judgment entered pursuant to rule 56(e)[112] on April 2, 1982, was reversed on the ground that summary judgment had not been available when the suit was filed.[113]

IV. Discovery

In *Ladner v. Ladner*[114] and in *Denman v. Hardy*,[115] the Mississippi Supreme Court considered the appropriate sanctions to be applied when a party fails to comply with the rules of discovery. In both cases the court applied the statutory counterparts of the relevant discovery provisions of the Mississippi Rules of Civil Procedure.[116]

In *Ladner*, a plaintiff was permitted to testify at trial to facts that at her deposition she had claimed not to remember. The Mississippi Supreme Court held, first, that exclusion of evidence that previously had been sought unsuccessfully in a party's deposition may be an appropriate sanction for the party's failure to supplement the earlier re-

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[109] Miss. R. Civ. P. 8(a)(1) requires merely "a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* Likewise, rule 8(e)(1) requires only that "[e]ach averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required." *Id.* 8(e)(1).

[110] *Witt*, 437 So. 2d at 67 (Robertson, J., concurring). The plaintiff had alleged that he was the son of his intestate father and that he was entitled to inherit by and through his natural father and grandfather. *Id. Cf.* Board of Managers v. George, 377 F.2d 228, 231 (8th Cir. 1967) (complaint alleging that racially segregated training schools for boys were maintained according to state law sufficient to raise validity of underlying state statute), *cert. denied*, 389 U.S. 845 (1967); Peace v. City of Center, 372 F.2d 649, 651 (5th Cir. 1967) (averment that city took and appropriated plaintiff's property without compensation and without condemnation stated claim for taking of property without due process of law).

Justice Robertson also expressed his opinion that the constitutional question had in fact been tried in the lower court by express or implied consent and, for that reason, would be treated under Rule 15(b) as if it had been raised in the pleadings. *Witt*, 437 So. 2d at 67 (Robertson, J., concurring); *see* Miss. R. Civ. P. 15(b).

[111] 437 So. 2d 387 (Miss. 1983).

[112] Miss. R. Civ. P. 56 permits the entry of summary judgment upon affidavits and other evidence sufficient to establish that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. *Id.* 56 comment.

[113] *Litten*, 437 So. 2d at 388.

[114] 436 So. 2d 1366 (Miss. 1983).

[115] 437 So. 2d 426 (Miss. 1983).

[116] In 1975, most of the discovery provisions of Fed. R. Civ. P. 26-37 were statutorily adopted by the Mississippi Legislature in Miss. Code Ann. §§ 13-1-226 to -237 (Supp. 1983).

sponse.[117] Such supplementation is required by rule 26(f)(2) and the corresponding statute[118] when the party later obtains information that so contradicts the former response as to make a failure to amend a knowing concealment.[119] Though the statute on discovery sanctions does not discuss a party's failure to supplement responses,[120] the court reasoned that it is within the trial court's "inherent power to protect the integrity of [its] processes" to fashion sanctions for such failure,[121] even where the opposing party has not previously sought an order com-

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[117] *Ladner*, 436 So. 2d at 1370. *See* MISS. CODE ANN. § 13-1-237(b)(2)(B) (Supp. 1983); MISS. R. CIV. P. 37(b)(2)(B) (when party fails to comply with order compelling discovery, court may prohibit him from introducing certain evidence).

[118] MISS. CODE ANN. § 13-1-226(e)(2) (Supp. 1983).

[119] Both the rule and the statute provide:

> A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

MISS. CODE ANN. § 13-1-226(e)(2) (Supp. 1983); MISS. R. CIV. P. 26(f)(2).

[120] *See* MISS. CODE ANN. § 13-1-237 (Supp. 1983). The statute and MISS. R. CIV. P. 37 provide for the imposition of sanctions in four situations: (1) a deponent's failure to be sworn or to answer a question after being ordered by a court to do so, MISS. CODE ANN. § 13-1-237(b)(1) (Supp. 1983); MISS. R. CIV. P. 37(b)(1); (2) a party's failure to obey an order to provide or permit discovery, MISS. CODE ANN. § 13-1-237(b)(2) (Supp. 1983); MISS. R. CIV. P. 37(b)(2); (3) a party's failure to admit truth of matter later proven to be true, in response to requests for admission, MISS. CODE ANN. § 13-1-237(c) (Supp. 1983); MISS. R. CIV. P. 37(c); and (4) a party's failure to attend his own deposition or serve answers to interrogatories or respond to a request for inspection, MISS. CODE ANN. § 13-1-237(d) (Supp. 1983); MISS. R. CIV. P. 37(d).

In addition to the sanctions provided in the statute, rule 37(e) provides for such other sanctions "as may be just" against any party or counsel who "otherwise abuses the discovery process in seeking, making or resisting discovery." MISS. R. CIV. P. 37(e). The comment to rule 37 emphasizes that this provision is intended to give "greater flexibility to the trial court in the form of a general grant of power which would enable it to deal summarily with discovery abuses, whenever and however the abuse is brought to the attention of the court." *Id.* comment.

[121] *Ladner*, 436 So. 2d at 1370; *see also* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2050 (1970); *cf.* Campbell Indus. v. M/V Gemini, 619 F.2d 24, 27 (9th Cir. 1980) (district court's broad discretion to make discovery and evidentiary rulings conducive to fair trial not abused by exclusion of testimony by plaintiff's expert, whom defendant's attorney had contacted *ex parte* while expert still retained by plaintiff). *But see* Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 905 (3d Cir. 1977) (exclusion of critical evidence is extreme sanction, not normally to be imposed absent willful deception or flagrant disregard of court order).

Presumably, the authority to fashion sanctions in response to a failure to supplement answers could also be found in the catch-all provision of rule 37(e). *See* MISS. R. CIV. P. 37(e); *see also supra* note 120.

pelling such supplementation.[122] The court found, however, that the decision whether to exclude testimony for failure to supplement a prior response was a discretionary matter[123] and concluded that the chancellor had not abused his discretion by admitting the plaintiff's testimony.[124]

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[122] *Ladner*, 436 So. 2d at 1370; *see also* Holiday Inns, Inc. v. Robertshaw Controls Co., 560 F.2d 856, 858 (7th Cir. 1977) (where in answer to interrogatories, plaintiff denied he had more than one theory of liability and never supplemented the answer, evidence supporting alternate theory of liability was properly excluded); Davis v. Marathon Oil Co., 528 F.2d 395, 403-04 (6th Cir. 1975) (failure to supplement answer to interrogatory requesting names of occurrence witnesses until three days before trial warranted exclusion of testimony by newly disclosed witnesses), *cert. denied*, 429 U.S. 823 (1976); Tabatchnick v. G.D. Searle & Co., 67 F.R.D. 49, 54-55 (D.N.J. 1975) (expert whose identity was not disclosed until first day of trial was properly excluded where defendant had served interrogatories inquiring about experts and had obtained pretrial disclosure order one year before).

[123] *Ladner*, 436 So. 2d at 1370; *see also* Campbell Indus. v. M/V Gemini, 619 F.2d 24, 27 (9th Cir. 1980) (trial court has broad discretion in discovery matters); Davis v. Marathon Oil Co., 528 F.2d 395, 403 (6th Cir. 1975); Clark v. Mississippi Power Co., 372 So. 2d 1077, 1080 (Miss. 1979) (court properly exercised discretionary power to exclude expert testimony where expert was not introduced until date of trial); Harkins v. Paschall, 348 So. 2d 1019, 1022 (Miss. 1977) (default on question of agency properly granted within court's discretion where answers to interrogatories were so evasive and unresponsive that they constituted willful refusal to answer).

[124] *Ladner*, 436 So. 2d at 1371; *see also* Kestenbaum v. Falstaff Brewing Corp., 575 F.2d 564, 575 (5th Cir. 1978) (no abuse of discretion in permitting expert to testify where plaintiff who was otherwise on notice that expert had been retained was not prejudiced by technical delay in supplementation of defendant's answers to interrogatories); Price v. Lake Sales Supply R.M., Inc., 510 F.2d 388, 395 (10th Cir. 1974) (no abuse of discretion in admitting evidence where district court did not believe failure to supplement answers amounted to knowing concealment); Dychalo v. Copperloy Corp., 78 F.R.D. 146, 148 (E.D. Pa. 1978) (no abuse of discretion in permitting expert to testify despite inadequacy of supplemental answer where plaintiff was otherwise on notice of expert's identity). *But see* Scott & Fetzer Co. v. Dile, 643 F.2d 670, 673-75 (9th Cir. 1981) (admitting testimony of witnesses and exhibits not listed in plaintiff's answers to interrogatories was abuse of discretion, denying defendant's right to prepare cross-examination and rebuttal); Smith v. Ford Motor Co., 626 F.2d 784, 797-800 (10th Cir. 1980) (permitting expert to testify regarding matters about which plaintiff had indicated the expert would not testify subjected defendant to unfair surprise and prejudice and was abuse of discretion) *cert. denied*, 450 U.S. 918 (1981); Shelak v. White Motor Co., 581 F.2d 1155, 1158-60 (5th Cir. 1978) (permitting expert to testify regarding injuries that plaintiff had not mentioned in answers to interrogatories was abuse of discretion); Voegeli v. Lewis, 568 F.2d 89, 96 (8th Cir. 1977) (permitting expert witness to testify was abuse of discretion where testimony differed substantially from statements made in deposition and where expert had not supplemented earlier answers after determining that they were incorrect); Square D Co. v. Edwards, 419 So. 2d 1327, 1329 (Miss. 1982) (permitting expert to testify about alleged design defects not mentioned either in expert's deposition or in plaintiff's answers to interrogatories was abuse of discretion); Huff v. Polk, 408 So. 2d 1368, 1370-71 (Miss.

In *Denman*, the plaintiff sought to have the testimony of the defendant's expert excluded, claiming that the defendant had given a vague and evasive response to an interrogatory seeking the facts and opinions to which the expert would testify.[125] The court considered whether, in such a case, such sanctions as exclusion of evidence were available under the statutory counterpart to rule 37 without a prior order compelling discovery.[126] The supreme court rejected this approach and followed the general rule that where there was no previous order compelling discovery, sanctions may be employed only for a total failure to answer interrogatories.[127] The court added that the plaintiff's

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1982) (permitting testimony of experts who were not identified in answers to interrogatories was abuse of discretion); *cf.* Murphy v. Magnolia Elec. Power Ass'n, 639 F.2d 232, 235 (5th Cir. 1981) (exclusion of rebuttal testimony by expert not identified in answers to interrogatories was abuse of discretion where defendant was not prejudiced by testimony and where testimony went to heart of plaintiff's case); DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193, 1201-02 (3d Cir. 1978) (exclusion of expert's testimony was abuse of discretion where plaintiff had independent notice of opinion to which expert would testify); Dudley v. South Jersey Metal, Inc., 555 F.2d 96, 98-100 (3d Cir. 1977) (exclusion of evidence for failure to supplement answers is abuse of discretion absent bad faith, willful misconduct or flagrant disregard of court orders).

[125] 437 So. 2d at 428. The plaintiff had propounded an interrogatory comporting with MISS. R. CIV. P. 26(b)(4)(A)(i) and its statutory counterpart, MISS. CODE ANN. § 13-1-226(b)(4)(A)(i) (Supp. 1983), asking for the subject matter to which the defendant's expert was expected to testify, the substance of the facts and opinions to which he was expected to testify and a summary of the grounds for the expert's opinions. The defendant had responded:

> (a) Mr. Mooney is expected to testify that the gated pipe was of sufficient size to drain the area which it was designed to drain.
>
> (b) Mr. Mooney has made such measurements and run such levels as were necessary to reach the opinion which he will give.
>
> (c) Mr. Mooney has, as stated above, made measurements, run levels and will use those facts and figures as grounds for his opinion.

Denman, 437 So. 2d at 428. The defendant did not supplement his response. *Id.*

[126] *Denman*, 437 So. 2d at 428; *see* MISS. CODE ANN. § 13-1-237(d) (Supp. 1983); MISS. R. CIV. P. 37(d) (regarding failure to answer interrogatories, court may make such orders as are just, including exclusion of evidence).

[127] *Denman*, 437 So. 2d at 429; *see also* Sigliano v. Mendoza, 642 F.2d 309, 310 (9th Cir. 1981) (order compelling discovery is not prerequisite to dismissal for failure to respond); Dorey v. Dorey, 609 F.2d 1128, 1135 (5th Cir. 1980) (sanctions imposed only after violation of court order with exception of situations involving rules 37(c) and 37(d)); Halverson v. Campbell Soup Co., 374 F.2d 810, 812 n.2 (7th Cir. 1967) (without order for answers, severe sanctions apply only for total failure to respond to interrogatories); 8 C. WRIGHT & A. MILLER, *supra* note 121 § 2291. *But see* Airtex Corp. v. Shelley Radiant Ceiling Co., 536 F.2d 145, 155 (7th Cir. 1976) (where evasiveness of response could not be determined until discovering party had conducted independent investigation, evasive response was tantamount to no answer at all and sanctions were appropriate under rule 37(d)); Alliance to End Repression v. Rochford, 75 F.R.D. 438, 440-41

proper remedy was either to seek an order compelling a more detailed response[128] or to take the expert's deposition.[129]

The distinctions illustrated by these cases regarding the need for a party to show non-compliance with a specific court order to obtain discovery sanctions are both fair and sensible. Clearly, where a party completely fails to respond to discovery or his answer is so patently unsubstantial as to amount to no response at all,[130] there is no need for further adjudication to establish non-compliance with the rules of discovery, and sanctions should be immediately available.[131]

Where there has been a failure to supplement an earlier answer on the basis of new information which renders the original response incorrect,[132] different considerations dictate the same result. To require a court order before sanctions may be imposed in such situations would be futile, since in most instances the discovering party would not know when the other's duty to supplement his answer has arisen, nor of the need to compel additional responses.[133]

(N.D. Ill. 1976) (sanctions were appropriate since evasive answers were treated as failure to answer); Harkins v. Paschall, 348 So. 2d 1019, 1022 (Miss. 1977) (sanctions were appropriate where answers were so evasive and unresponsive as to constitute willful refusal to answer).

[128] *Denman*, 437 So. 2d at 429; *see also* Markham v. Colonial Mort. Serv. Co., 605 F.2d 566, 571 (D.C. Cir. 1979) (motion to compel discovery should have been made prior to motion for sanctions); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 40 F.R.D. 96, 108 (N.D. Ill. 1966) (evasive and incomplete answers to interrogatories did not warrant severe sanctions absent plaintiff's request for order compelling further interrogatories); Southard v. Pennsylvania R. Co., 24 F.R.D. 456, 457 (E.D. Pa. 1959) (for evasive answers courts usually order further answers); Cardox Corp. v. Olin Mathieson Chem. Corp., 23 F.R.D. 27, 31 (S.D. Ill. 1958) (instead of dismissing, court ordered that interrogatories be answered more fully).

[129] 437 So. 2d at 429. A party who has inquired about the other's expert through appropriate interrogatories may move the trial court to order further discovery from the expert by other means. MISS. CODE ANN. § 13-1-226(b)(4)(A)(ii) (Supp. 1983); MISS. R. CIV. P. 26(b)(4)(A)(ii). Usually the expert's deposition is ordered. 4 C. WRIGHT & A. MILLER, *supra* note 8, § 2013 (1970 & Supp. 1983).

[130] *See* Airtex Corp. v. Shelley Radiant Ceiling Co., 536 F.2d 145, 155 (7th Cir. 1976) (where evasive response is tantamount to no answer at all, sanctions are appropriate); Harkins v. Paschall, 348 So. 2d 1019, 1022 (Miss. 1977) (sanctions are appropriate where answers are so evasive and unresponsive as to constitute willful refusal to answer).

[131] *See* MISS. CODE ANN. § 13-1-237(d) (Supp. 1983); MISS. R. CIV. P. 37(d) (authorizing sanctions for failure to answer interrogatories).

[132] *See* MISS. CODE ANN. § 13-1-226(e) (Supp. 1983); MISS. R. CIV. P. 26(f) (concerning duty to supplement responses).

[133] *See Denman*, 437 So. 2d at 429; *cf.* Airtex Corp. v. Shelley Radiant Ceiling Co., 536 F.2d 145, 155 (7th Cir. 1976) (sanctions appropriate where evasiveness of response could not be determined until discovering party had conducted independent investigation to obtain necessary information).

However, where a response has been made and the discovering party is dissatisfied with it, further adjudication is generally required to determine whether the responding party has failed to comply with the discovery requirements. In this situation, the discovering party is subject to the minimal burden of seeking an order compelling a further response before he may be entitled to sanctions[134]—a burden which is further minimized by the availability of an award of expenses and fees incurred in seeking the order if one is obtained.[135]

It is, of course, essential that trial courts have broad discretion[136] in fashioning sanctions that will strike a balance in each case between the competing interests at stake. These interests include the integrity of the discovery process, the discovering party's right to protection against unfair surprise and prejudice resulting from the nondisclosure of discoverable matter,[137] and the interest of the noncomplying party in having his case fully and fairly heard.[138] The sanctions that are specifically authorized vary greatly in severity and include the drastic remedies of dismissal or default.[139] Even the exclusion of evidence[140] or an order that designated facts are to be taken as true[141] may be dispositive of the case if the evidence in question is critical.[142] Thus, sanc-

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[134] *See supra* notes 127-128 and accompanying text.

[135] *See* MISS. CODE ANN. § 13-1-237(a)(4) (Supp. 1983); MISS. R. CIV. P. 37(a)(4).

[136] *See supra* note 123 and accompanying text.

[137] *Cf.* Scott & Fetzer Co. v. Dile, 643 F.2d 670, 673-75 (9th Cir. 1981) (admitting testimony of witnesses not listed in answers to interrogatories denied defendant's right to prepare cross-examination and rebuttal); Smith v. Ford Motor Co., 626 F.2d 784, 797-99 (10th Cir. 1980) (nondisclosure of substance of experts' testimonies misled defendant in preparation of its defense); Marshall v. Sagona, 621 F.2d 763, 768 (5th Cir. 1980) (prejudice to the other party's preparation for trial is consideration in ordering sanctions); Coleco Indus. Inc. v. Berman, 567 F.2d 569, 576 n.14 (3rd Cir. 1977) (introduction of undisclosed evidence would significantly disrupt trial process); Tabatchnick v. G.D. Searle & Co., 67 F.R.D. 49, 54-55 (D.N.J. 1975) (failure to supplement answers concerning substance of expert testimony prejudiced other party).

[138] *Cf.* Societe Internationale pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197, 209-12 (1958) (fifth amendment due process denial may be found when complaint is dismissed despite plaintiff's good-faith effort to comply with production order).

[139] *See* MISS. CODE ANN. § 13-1-237(b)(2)(C) (Supp. 1983); MISS. R. CIV. P. 37(b)(2)(C).

[140] *See* MISS. CODE ANN. § 13-1-237(b)(2)(B) (Supp. 1983); MISS. R. CIV. P. 37(b)(2)(B).

[141] *See* MISS. CODE ANN. § 13-1-237(b)(2)(A) (Supp. 1983); MISS. R. CIV. P. 37(b)(2)(A).

[142] *See* DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193, 1201-02 (3d Cir. 1978); Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 904 (3d Cir. 1977); *cf.* Murphy v. Magnolia Elec. Power Ass'n, 639 F.2d 232, 235 (5th Cir. 1981) (ex-

tions in a particular case should always be selected with a view toward equity, justice[143] and due process.[144] Sanctions that are likely to be dispositive of a case should be reserved for situations involving bad faith, willfulness or callous disregard of a party's responsibilities.[145]

Andrew D. Sweat

Jeffrey P. Sweetland

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clusion of expert whose rebuttal testimony went to heart of plaintiff's case was error where there was no prejudice to defendant).

[143] Both the statute and the rule provide that trial courts should impose such sanctions "as are just." *See* MISS. CODE ANN. § 13-1-237(b)(2) (Supp. 1983); MISS. R. CIV. P. 37(b)(2).

[144] *See* Societe Internationale pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197, 209 (1958); Donnelley v. Johns-Manville Sales Corp., 677 F.2d 339, 341-42 (3rd Cir. 1982); Affanato v. Merrill Bros., 547 F.2d 138, 140 n.3 (1st Cir. 1977).

[145] *Compare Societe Internationale,* 357 U.S. at 208-12 (dismissal improper where plaintiff's failure to comply with production was due to mere inability and where plaintiff had made good faith, diligent efforts); Marshall v. Segona, 621 F.2d 763, 768 (5th Cir. 1980) (dismissal inappropriate where noncompliance is due to simple negligence, attorney negligence, or mere inability to comply); Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 905 (3d Cir. 1977)(exclusion of critical evidence improper absent willful deception or flagrant disregard of court order); *and* Dudley v. South Jersey Metal, Inc., 555 F.2d 96, 99-100 (3d Cir. 1977) (absent bad faith or willful misconduct or flagrant disregard of court order, exclusion of evidence improper); *with* National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 640-43 (1976) (failure to answer crucial interrogatories after 17 months and numerous orders and extensions was callous disregard of responsibilities, warranting dismissal); Sigliano v. Mendoza, 642 F.2d 309, 310 (9th Cir. 1981) (dismissal warranted where total failure to respond to interrogatories manifested willfulness and bad faith); Phillips v. Insurance Co. of N. Am., 633 F.2d 1165, 1167 (5th Cir. 1981) (dismissal proper where party's repeated rejections of efforts to resolve discovery disputes indicated bad faith); Bonaventure v. Butler, 593 F.2d 625, 626 (5th Cir. 1979) (dismissal proper for plaintiff's repeated refusal to appear for deposition); *and* DiGregorio v. First Rediscount Corp., 506 F.2d 781, 788-89 (3d Cir. 1974) (dismissal warranted where party displayed pattern of flagrant disregard of rules of discovery and court order).

CONTRACTS & COMMERCIAL LAW

In 1983, the Mississippi Supreme Court decided twenty-two cases involving contract, partnership, and commercial law. Several of these decisions represent significant developments in Mississippi law and have been chosen for textual commentary. These developments concern the demise of privity as a prerequisite to liability for breach of implied warranty;[1] the scope of the attorneys' fees remedy afforded creditors on open accounts under section 11-53-81 of the Mississippi Code;[2] conflicts between the priority provisions of Article 9 of the Mississippi Commercial Code and the common law right to set-off;[3] the appropriate standard for measuring a creditor's "good faith" belief of insecurity, triggering the exercise of an acceleration clause;[4] and classification of a farmer as a merchant under the Mississippi Commercial Code.[5] Less significant decisions by the court involved the availability of breach of warranty as an affirmative defense to a suit for a deficiency;[6] proceedings to dissolve partnership property;[7] applicability of the parol evidence rule;[8] use of the "benefit-of-bargain" damage measurement;[9] the relationship between commercial law priority provisions

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[1] Keyes v. Guy Bailey Homes, Inc., 439 So. 2d 670 (Miss. 1983). For a more thorough discussion, see *infra* notes 20-45 and accompanying text. *See also* Note, 53 MISS. L.J. 653 (1983).

[2] Magnolia Farm Servs., Inc. v. Tunica Oil Co., Inc., 438 So. 2d 285 (Miss. 1983). For a more thorough discussion, see *infra* notes 46-60 and accompanying text.

[3] Bank of Crystal Springs v. First Nat'l Bank, 427 So. 2d 968 (Miss. 1983). For a more thorough discussion, see *infra* notes 61-87 and accompanying text.

[4] Black v. Peoples Bank & Trust Co., 437 So. 2d 26 (Miss. 1983). For a more thorough discussion, see *infra* notes 88-105 and accompanying text.

[5] Vince v. Broome, 443 So. 2d 23 (Miss. 1983). For a more thorough discussion, see *infra* notes 106-121 and accompanying text. *See also* Note, 54 MISS. L.J. 175 (1984).

[6] Jones v. Deposit Guar. Nat'l Bank, 427 So. 2d 97, 99 (Miss. 1983) (§ 75-9-318(1) of the Mississippi Commercial Code allows account debtor to assert affirmative defense of breach of warranty in suit by assignee to recover deficiency judgment under installment loan agreement).

[7] Deposit Guar. Nat'l Bank v. Biglane, 427 So. 2d 945, 953 (Miss. 1983) (trustee sale of partnership property does not constitute proceeding to dissolve partnership).

[8] Sammons Communications, Inc. v. Polk, 429 So. 2d 564, 567 (Miss. 1983) (evidence of oral modification of written contract properly admissible); Security Mut. Fin. Corp. v. Willis, 439 So. 2d 1278, 1281-82 (Miss. 1983) (evidence of prior or contemporaneous parol agreement not admissible to contradict express terms of subsequent written agreement).

[9] Davidson v. Rogers, 431 So. 2d 483, 485 (Miss. 1983) ("benefit-of-bargain" rule, i.e., difference between real and represented value of property, applied as measure of

and the bulk transfer pro rata distribution provision under section 75-6-106(3) of the Mississippi Code;[10] the scope of the "mutual mistake" contractual remedy;[11] proper distribution of profits flowing from the use of repossessed collateral;[12] the proper measure of damages for conversion of timber;[13] the relationship between prospective consequential injury and breach of contract;[14] "transfer of title" conflict between the Mississippi Vehicular Title Statute, section 63-21-31, and the entrustment statute, section 75-2-403(2);[15] the measure of damages for a lender's breach of a loan agreement;[16] construction of an acceleration clause in a lease agreement;[17] sufficiency of compliance with the statute of frauds provision in section 75-2-201 of the Mississippi Commercial Code;[18] and application of the statute of frauds provision in section 15-3-1 of the Mississippi Code.[19]

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damages for fraudulent conduct in contractual setting).

[10] William Iselin & Co., Inc. v. Delta Auction & Real Estate Co., 433 So. 2d 911, 915 (Miss. 1983) (secured status cannot be destroyed by bulk transfer auction sale; cash proceeds of debtor's assets not subject to judgment lien absent seizure).

[11] Hilbert v. Le, 434 So. 2d 1354, 1355-56 (Miss. 1983) (mistake regarding legal rights does not constitute mutual mistake of fact rendering contract voidable).

[12] Murray v. Payne, 437 So. 2d 47, 53-55 (Miss. 1983) (section 75-9-207(2)(c) obligates secured party in possession of substitute collateral after default to apply profits received through use of such collateral to reduction of secured debt).

[13] Bay Springs Forest Prods., Inc. v. Wade, 435 So. 2d 690, 694 (Miss. 1983) (purchaser of converted timber acquires no title from transferors and is liable to true owner for fair market value of timber at delivery despite good faith and paid value).

[14] Crawford Commercial Constructors, Inc. v. Marine Indus. Residential Insulation, Inc., 437 So. 2d 15, 16 (Miss. 1983) (prospective danger of consequential injury insufficient to sustain cause of action for breach of contract).

[15] Atwood Chevrolet-Olds, Inc. v. Aberdeen Mun. School Dist., 431 So. 2d 926, 927-28 (Miss. 1983) (section 75-2-403(2), granting a merchant power to transfer all rights and title of an entruster to a buyer in ordinary course of business, prevails over section 63-21-31, providing that transfer of the vehicle is ineffective unless an assignment and warranty of title is executed by owner in favor of transferee at time of delivery).

[16] First Miss. Bank of Commerce v. Latch, 433 So. 2d 946, 950-51 (Miss. 1983) (damages for lender's breach of loan agreement limited to difference in interest charge when borrower forced to secure loan from alternative source).

[17] Frey v. Abdo, 441 So. 2d 1383, 1385-86 (Miss. 1983) (right to accelerate requires clearly expressed acceleration provision in contract).

[18] Franklin County Coop. v. MFC Servs., 441 So. 2d 1376, 1378 (Miss. 1983) (letter by defendant's lawyer subsequent to oral contract can be sufficient to render contract enforceable under statute of frauds provision of section 75-2-201(1); possibility of admission by defendant during trial that contract existed precludes motion to dismiss for noncompliance with section 75-2-201).

[19] Crawler Parts, Inc. v. Hill, 441 So. 2d 1357, 1358 (Miss. 1983) (in order to avoid operation of section 15-3-1(a) statute of frauds, requiring promise to pay debt of another to be in writing, creditor entitled to evidentiary hearing to prove deceased contracted in

I. Contract Law

A. *Abolition of Privity Requirement for Breach of Implied Warranty*

Keyes v. Guy Bailey Homes, Inc.[20] will probably have a tremendous impact on the remedies available to secondary homeowners whose homes suffer from latent construction defects. This case involved a claim by Kathleen Keyes, a subsequent purchaser of a home, against the builder of the home, Guy Bailey Homes, Inc., for negligent construction and breach of warranty. The complaint alleged the existence of a latent defect, a cracked foundation. The lower court sustained defendant's motion to dismiss the claim on the ground of lack of privity between the parties. The Mississippi Supreme Court reversed and remanded. The court held that a homebuilder may be found liable for negligence or breach of implied warranty in the construction of a home, notwithstanding the lack of contractual privity between the homeowner and the homebuilder.[21] Additionally, the court took this opportunity to interpret section 11-7-20 of the Mississippi Code[22] as removing the privity requirement "in all cases," and furthermore held the statute to have retroactive application.[23]

In 1974, the Mississippi Supreme Court in *Oliver v. City Builders, Inc.*[24] expressly held that a remote purchaser of a home could *not* maintain an action for breach of implied warranty against the builder of the home.[25] Two years following that decision, the Mississippi legislature promulgated section 11-7-20 of the Mississippi Code, which abolished privity as a prerequisite to the maintenance of an action based on strict liability or breach of warranty.[26] The plain wording of

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own behalf); Winstead v. Roberts, 431 So. 2d 1137, 1139 (Miss. 1983) (absent written agency agreement, section 15-3-1 statute of frauds precludes grantee's enforcement of contract for sale of real property evidenced by writing signed only by grantor's attorney).

[20] 439 So. 2d 670 (Miss. 1983).

[21] *Id.* at 670-71.

[22] Miss. Code Ann. § 11-7-20 (Supp. 1983) provides: "In all causes of action for personal injury or property damage or economic loss brought on account of negligence, strict liability or breach of warranty, including actions brought under the provisions of the Uniform Commercial Code, privity shall not be a requirement to maintain said action." *Id.*

[23] 439 So. 2d at 672-73.

[24] 303 So. 2d 466 (Miss. 1974).

[25] *Id.* at 469.

[26] Miss. Code Ann. § 11-7-20 (Supp. 1983) (text reprinted *supra* note 22). It is interesting to note that the United States District Court for the Northern District of Mis-

the statute does not establish the existence of an action for breach of warranty against a homebuilder; but, if such an action were allowed, the statute would unequivocally abolish privity as a prerequisite to recovery. Such a cause of action was allowed in Mississippi in 1978. In *Brown v. Elton Chalk, Inc.*,[27] the Mississippi Supreme Court held that a homeowner could bring an action against the homebuilder for breach of implied warranty of workmanship and habitability; however, this action was only made available for a "first purchaser."[28] Interestingly, the court chose to ignore the legislative mandate of section 11-7-20.

Two years later in *Hicks v. Greenville Lumber Co., Inc.*,[29] the court's seeming disregard for section 11-7-20 was again apparent. The court once again refused to extend the breach of implied warranty remedy to subsequent home-purchasers,[30] despite the legislative abolition of the privity requirement and despite the fact that several other jurisdictions had already extended this remedy to subsequent purchasers.[31]

Although abolition of the privity requirement in *Keyes* has finally reconciled decisional law with statutory authority, criticisms of the opinion should be noted. As the dissent in *Keyes* pointed out, homebuilders have detrimentally relied on *Hicks, Brown,* and *Oliver.* Retroactive application of section 11-7-20 could thus result in increased potential financial liability for which homebuilders have not provided, and, as observed in the dissenting opinion, this increased scope of liability would be "grossly unfair."[32] On the other hand, the

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sissippi appears to have interpreted this statute as abolishing both horizontal and vertical privity requirements. *See* Cochran v. Rockwell Int'l Corp., 564 F. Supp. 237, 242-43 (N.D. Miss. 1983) (lack of privity no bar to action for breach of implied warranty by virtue of section 11-7-20).

[27] 358 So. 2d 721 (Miss. 1978).

[28] *Id.* at 722.

[29] 387 So. 2d 94 (Miss. 1980).

[30] *Id.* at 96.

[31] Other jurisdictions have proceeded on the theory that implied warranties of fitness and habitability should extend to subsequent purchasers for a reasonable time since those purchasers are members of the class for which the home was constructed. *See* Terlinde v. Neely, 271 S.E.2d 768, 769-70 (S.C. 1980) (accord). *But see, e.g.,* P.B.R. Enters., Inc. v. Perren, 243 Ga. 280, 253 S.E.2d 765, 767 (1979) (caveat emptor applies in sales of realty and there are no implied warranties as to physical condition of property); Altevogt v. Tom Brinkoetter & Co., 81 Ill. App. 3d 711, 401 N.E.2d 1302, 1304, 1305 (1980) (implied warranties extend only to first purchasers, not to subsequent purchasers as third party beneficiaries); Crowder v. Vandendeale, 564 S.W.2d 879, 881 (Mo. 1978) (builder's liability based in contract, not tort; therefore subsequent purchaser's lack of privity precludes action against builder).

[32] 439 So. 2d at 674 (Walker, J., dissenting).

majority found that no inequity exists since the homebuilder's duty to construct the home in a workmanlike manner has not changed. The court reasoned that its decision merely represented an enlargement of a remedial rule in an effort to "strengthen enforcement of the so-called primary rule—the duty to construct the home in a workmanlike manner."[33] The court concluded that the extension of potential liability to subsequent purchasers does not affect this duty and thus effectuates no unfair surprise against the building industry.[34]

Notwithstanding the majority's strained logic and semantic distinctions between "primary" and "remedial" rule changes,[35] it simply cannot be denied that the retroactive application of this rule change, extending the homebuilders' potential for liability, will undoubtedly result in unfair surprise and increased burdens on the home-building industry in the state of Mississippi. The dissent noted that the majority opinion "changes the rule in the middle of the game as to those homebuilders who built homes prior to the enactment of section 11-7-20 on April 27, 1976."[36] This analysis by the dissent falls short only in delineating the full extent of the inequity of the *Keyes* decision. The rule change has as great an adverse effect on those who constructed homes subsequent to the *Brown* decision in 1978, which maintained privity as a prerequisite to recovery for breach of implied warranty, as it does on homebuilders who constructed homes prior to the enactment of section 11-7-20 in 1976.[37] Whether the homebuilder's reliance cen-

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[33] *Id.* at 672-73. The court cited Pruett v. City of Rosedale, 421 So. 2d 1046 (Miss. 1982), abolishing governmental immunity from tort liability, for an illustration of a change in a "primary rule." The retroactive application of such a rule would have worked an inequity and unfair surprise on state and local governmental entities, since they had no opportunity to prepare against exposure to liability. 439 So. 2d at 672. The court contrasted *Pruett* with the result in Tideway Oil Programs v. Serio, 431 So. 2d 454 (Miss. 1983), which estabished the availability of punitive damage recovery in chancery court. The court reasoned that retroactive application of such a rule would not result in an inequity, because punitive damages had always been awarded in cases involving grossly negligent acts. *See Keyes*, 439 So. 2d at 672-73.

[34] 439 So. 2d at 673.

[35] *See supra* note 33.

[36] *Id.* at 674 (Walker, J., dissenting).

[37] MISS. CODE ANN. § 15-1-41 (1972) places a ten year statute of limitations upon actions for personal injury or property damage arising from latent construction defects. The ten year time period begins to run at the time of "the written acceptance or actual occupancy or use, whichever occurs first, of such improvements by the owner thereof." *Id.* For the statute to serve its intended purpose, its language must be construed to refer to acceptance or occupancy by the first owner. Prior to *Keyes*, homebuilders enjoyed the certainty that their potential liability for latent defects could be defeated in one of two ways: (1) by expiration of the ten year statute of limitations; or (2) by sale of the home

tered on the legislative or judicial pronouncement, retroactive application of the *Keyes* decision to homes built during either of these time frames results in the same inequity.

It must be presumed that business decisions made by homebuilders are not immune from the basic economic forces of supply and demand and prudent cost-benefit analysis. As the cost of producing a home increases, in the form of greater potential liability for negligent construction and breach of implied warranty of habitability, some homebuilders may choose to increase the price for their services while others may choose not to enter the housing industry at all.[38] The *Keyes* decision has completely distorted the decision-making process undertaken by many homebuilders who constructed homes both before April 27, 1976, and after the 1978 *Brown* decision. The majority's focus on the "duty" owed to the homeowner,[39] in an effort to determine whether retroactive application of *Keyes* would unfairly surprise the homebuilding industry, was misdirected. The court's analysis should have focused on whether retroactive application of *Keyes* would undermine the business decisions made by many firms in the homebuilding industry. Even a layman's knowledge of microeconomics and business analysis suggests the inherent inequities in the retroactive application of *Keyes*.

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by the first owner to a subsequent purchaser. Retroactive application of *Keyes* will affect builders of pre-1976 homes which were accepted or occupied at a time placing them currently within the statute's ten year limit, even though those homes have since been transferred to subsequent purchasers.

[38] *See generally* E. MANSFIELD, MICROECONOMICS (2d ed. 1976) (discussion of relationships between costs, profits, prices, supply and demand and various other economic variables affecting the business decisions of firms and industries). Fundamentals of microeconomics suggest that the price a firm in a competitive market charges for its product is a function of the total costs associated with production. *See generally id.* at 177-210 (price and output under perfect competition). As the costs of producing a home increase in the form of higher insurance premiums and higher risk of potential liability for breach of implied warranty, the price charged for producing the home will increase. Higher prices will result in a lower demand and greater supply for housing. Likewise, lower prices will produce the directly opposite effect. As a result of § 11-7-20 and the *Brown* decision, homes were being produced for artificially low prices. The builders were simply not aware of the costs mentioned above. At this point, many homebuilders may have produced homes at prices much lower than actual costs. Had this information been known to the building industry, many builders would have either raised their prices or totally withdrawn from the industry. *See id.* at 192-93 (long-run equilibrium of the firm).

[39] 439 So. 2d at 373.

B. Attorneys' Fee: Suit on Open Account

Section 11-53-81 of the Mississippi Code provides for recovery of reasonable attorneys' fees by a creditor "[w]hen any person fails to pay an open account within thirty (30) days after receipt of a written demand . . . when judgment on the claim is rendered in favor of the plaintiff."[40] In *Magnolia Farm Services, Inc. v. Tunica Oil Co.*,[41] the Mississippi Supreme Court was called upon to determine whether this remedy accrued in favor of the creditor thirty-one days after receipt of demand for payment, when suit was filed, or only after formal judgment was rendered in favor of the creditor.[42] This was a case of first impression for the supreme court.

Tunica Oil Company, Inc., filed suit against Magnolia Farm Services, Inc., for payment on an open account and collection of attorneys' fees pursuant to section 11-53-81 of the Mississippi Code. After initiation of the action, but prior to litigation of the claim, the defendant tendered and the plaintiff accepted payment as settlement for the amount due on the account plus accrued interest. This settlement was made with the understanding that the issue of collection of attorney's fees under section 11-53-81 would be reserved for litigation. The trial court apparently construed the statute to allow collection of attorneys' fees if payment on the account was not tendered thirty days after receipt of the written demand.[43] The Mississippi Supreme Court reversed and held that collection of attorneys' fees pursuant to section 11-53-81 is allowed only if a " '*judgment* on the claim is rendered.' "[44]

The ambiguity inherent in this poorly drafted statute, combined with the absence of any legislative history or Mississippi state court precedent, prompted the court to focus on a similar Louisiana statute which apparently served as the model for section 11-53-81.[45] Fortunately for debtors, the Mississippi Supreme Court chose to distinguish a Louisiana appellate decision which expressly stated that the debtor could avoid "application of the statute at any time before *filing* of the suit by paying the account."[46] The court instead relied on the funda-

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[40] MISS. CODE ANN. § 11-53-81 (Supp. 1983).

[41] 438 So. 2d 285 (Miss. 1983).

[42] *Id.* at 287.

[43] *Id.* at 286-87.

[44] *Id.* at 288 (emphasis added).

[45] *See id.* at 287 (original bill in Mississippi House apparently patterned after Louisiana statute). The Louisiana statute quoted by the court can be found in LA. REV. STAT. ANN. § 9:2781 (West Supp. 1983).

[46] Barbato, Super & Robinson, Inc. v. Koerner, 394 So. 2d 820, 822 (La. Ct. App. 1981) (emphasis added), *distinguished in Magnolia Farm Servs.*, 438 So. 2d at 288. The

mental doctrine that statutes in derogation of common law are to be strictly construed—thus mandating that a judgment actually have been "rendered."[47] The court reasoned that if the legislature had intended that the right to attorneys' fees would attach upon filing of suit, "such intent could have been easily expressed."[48]

The decision-making process utilized by prudent businessmen in an effort to determine whether or not to extend credit necessarily involves a cost-benefit analysis.[49] This analysis requires measuring the costs associated with extension of credit such as bad debt loss, the cost of accounting, the cost of financing inventory and accounts receivable, and the cost of collection efforts (i.e., attorneys' fees, etc.). These costs must be weighed against various benefits such as increased customer patronage and higher volume sales. Through promulgation of section 11-53-81, the state legislature has chosen to interfere with business decisions uniquely characteristic of our free-enterprise system. Perhaps the majority in *Magnolia Farm Services, Inc.*, sought to lessen the intrusive nature of this legislation by strictly construing the statute to require rendition of a formal judgment.[50]

It is unfortunate that the very narrow holding in this opinion left several important questions unanswered. For instance, what constitutes the *rendition* of a judgment? Will judgment by confession or default activate the statute?[51] The dissenters in *Magnolia Farm Services,*

Mississippi Supreme Court distinguished *Koerner* on the basis that an actual trial on the merits for payment of the account had transpired. 438 So. 2d at 288.

See also Metropolis, Inc. v. Hanson, 434 So. 2d 1207, 1210-11 (La. Ct. App. 1983) (attorneys' fees awarded pursuant to LA. REV. STAT. ANN. § 9:2781 (West Supp. 1983)); Dyna Int'l Corp. v. Mashburn, 397 So. 2d 1080, 1082-83 (La. Ct. App. 1981) (same).

[47] 438 So. 2d at 288. *See* Quick Shops, Inc. v. Bruce, 232 So. 2d 351, 354 (Miss. 1970) (strict construction of statutes in derogation of common law).

[48] 438 So. 2d at 288.

[49] *See generally* J. VAN HORN, FINANCIAL MANAGEMENT & POLICY 430-34, 440-42, 449-51 (5th ed. 1980) (discussion of costs, benefits, and strategies associated with credit).

[50] It may also be of interest to note the availability of credit insurance to protect proprietors against above normal losses. *See id.* at 450. This option, coupled with prudent business analysis of various factors affecting the determination of whether to extend credit, provides adequate protection for the creditor without the need for the § 11-53-81 attorneys' fees remedy.

[51] *See* Kem Search, Inc. v. Sheffield, 434 So. 2d 1067, 1070 (La. 1983) (implication that had proof been adequate and default judgment valid, a default judgment would have sufficed to obligate debtor to pay attorneys' fees under LA. REV. STAT. ANN. § 9:2781 (West Supp. 1983)); *cf.* MISS. CODE ANN. § 11-7-171 (1972) (in actions on an open account, "where a copy of the account is filed with the declaration, if judgment be rendered on demurrer, by confession, or by default, the clerk shall calculate the amount due for principal and interest, and judgment shall be entered therefor and be final, if not set

Inc., submit that payment of the open account by the debtor constituted a judgment by confession and suggest that such a judgment satisfied the "judgment . . . rendered" prerequisite of section 11-53-81.[52] In this respect, the logic of the dissenting argument can hardly be denied. Borrowing the rationale adopted by the majority, if the legislature had intended to limit the scope of the term "judgment" under section 11-53-81, "such intent could have been easily expressed."[53]

II. Commercial Law

A. Article 9 Priority Provisions Versus Right to Set-Off

Section 75-13-1 of the Mississippi Commercial Code provides in part that "[i]n all actions on . . . assigned [instruments] . . ., for the payment of money or other thing not payable to order or bearer, the defendant shall be allowed the benefit of all . . . *setoffs* made . . . previous to notice of assignment in the same manner as though the suit had been brought by the payee."[54] Generally, the priority provisions of Article 9 of the Commercial Code establish that a party with a properly perfected security interest shall have priority as to the secured collateral and the proceeds thereof over those with unperfected security interests.[55] These priority provisions of Article 9 are subject to the lim-

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aside during the term.").

[52] 438 So. 2d at 288-89 (Prather, J., dissenting). Justice Prather also presented a very tenable argument suggesting that the legislative intent of the statute has been defeated by allowing debtors to avoid the penalty of § 11-53-81 by tender of payment after the complaint has been filed. *Id.* at 288.

[53] *See supra* note 48 and accompanying text.

[54] Miss. Code Ann. § 75-13-1 (1972) (emphasis added).

[55] Certificates of deposit are classified by most jurisdictions as "instruments" as defined in § 75-9-105(1)(i) of the Mississippi Commercial Code. *E.g.*, Citizens Nat'l Bank v. Bornstein, 374 So. 2d 6, 9 (Fla. 1979) (certificates of deposit included in definition of "instruments" by most authorities). This classification generally applies whether the certificates are negotiable or non-negotiable. *See, e.g., id.* at 6 ("If the code drafters had intended to exclude non-negotiable instruments from coverage" under § 9-105(1)(i), "they would have . . . limited it to include only 'negotiable instruments' as was done in article [sic] 3.").

Miss. Code Ann. § 75-9-304(1) (1972) provides that a security interest in these instruments can be perfected only by possession. Section 75-9-201 of the Code's priority scheme provides in part: "Except as otherwise provided by this code a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors." Miss. Code Ann. § 75-9-201 (1972). It is fundamental that this section establishes the priority of a perfected secured party in possession of a certificate of deposit over unsecured parties and unperfected secured parties. *See, e.g.,*

itations set forth in section 75-9-104,[56] one of which is that Article 9 is not applicable "to any right of set-off."[57] The interplay of these provisions frames the basic issue addressed by the Mississippi Supreme Court in *Bank of Crystal Springs v. First National Bank of Jackson.*[58] Is the claim by a secured party, in his capacity as assignee, to the funds represented by a properly perfected non-negotiable certificate of deposit subject to set-off by the issuer of the certificate for an amount owed to the issuer by the assignor of the certificate?

The defendant, First National Bank, issued a certificate of deposit, No. 34869, to James E. McCuller. Subsequent to this issuance, McCuller assigned and delivered this certificate to First National as security for the payment of a $20,000.00 note executed by him. The note and security interest were renewed on several occasions. However, on January 17, 1980, First National mistakenly delivered the certificate to McCuller rather than retaining possession as required to properly maintain its perfected security interest in the instrument.[59] In February of 1980, McCuller executed a promissory note in favor of the plaintiff, Bank of Crystal Springs. This note was secured by the assignment and delivery of certificate of deposit No. 34869 to the Bank of Crystal Springs. On March 10, 1980, First National, having realized its mistake, requested that McCuller return the certificate. McCuller refused to do so and First National responded by purportedly voiding the certificate and issuing certificate No. 39498 in replacement as security for McCuller's indebtedness to First National. Thereafter, McCuller defaulted on his obligation to the Bank of Crystal Springs. In an effort to execute on its perfected security interest, the plaintiff presented certificate No. 34869 to the defendant for payment. The defendant refused to pay to plaintiff the funds represented by the certificate.[60]

After an adverse judgment at the trial court level, the plaintiff appealed to the Mississippi Supreme Court, contending that the right to the funds represented by the certificate should be determined in accordance with the priority provisions of Article 9 of the Mississippi Commercial Code rather than by section 75-13-1. Although curiously no ex-

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National Acceptance Co. of America v. Virginia Capital Bank, 498 F. Supp. 1078, 1085 (E.D. Va. 1980) (quoting J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 901 (1st ed. 1972)).

[56] MISS. CODE ANN. § 75-9-104 (1972).

[57] *Id.* at § 75-9-104(i).

[58] 427 So. 2d 968 (Miss. 1983).

[59] *Id.* at 969. *See* MISS. CODE ANN. § 75-9-304(1) (1972) (perfection of security interest in instrument by possession only).

[60] 427 So. 2d at 969.

press reference was made to section 75-9-104(i), the court found that the priority provisions of Article 9 were not applicable to the right of set-off. "[T]he claimant to a right of set-off is not precluded from this right merely because another claimant to the security has perfected its interest in the security by taking possession of it."[61] In dicta, the court further emphasized that the plaintiff's security interest was in the certificate of deposit and not in the funds represented by the certificate.[62]

Although cases in other jurisdictions can be found which support the position adopted by the Mississippi Supreme Court,[63] it appears that most jurisdictions which have ruled on this issue embrace a narrower view of the operation of section 9-104(i).[64] Basically, the division in these cases centers on how broadly the court chooses to interpret

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[61] *Id.* at 971.

[62] *Id.* No authority was cited to support this assertion.

[63] *See, e.g.*, State Bank of Rose Creek v. First State Bank, 320 N.W.2d 723, 726 (Minn. 1982) (section 9-104(i) clearly intended to exclude set-offs from priority provisions of Article 9 as well as security and filing requirements), *cited with approval in Bank of Crystal Springs*, 427 So. 2d at 971; First Nat'l Bank v. Lone Star Life Ins. Co., 529 S.W.2d 67, 68 (Tex. 1975) (section 9-104(i) "excludes 'any right of set-off' from the application of Chapter 9"), *cited with approval in Bank of Crystal Springs*, 427 So. 2d at 971.

The Minnesota Supreme Court in *State Bank of Rose Creek* was presented with a factual situation very similar to that in *Bank of Crystal Springs*. The secured party claiming priority to the non-negotiable certificates of deposit was in possession of the certificates. But, unlike the facts in *Bank of Crystal Springs*, the bank's right to set-off accrued before this security interest was perfected. 320 N.W.2d at 724. Noting the importance of this sequence, *id.* at 726, the Minnesota court found Article 9 inapplicable to the priority dispute pursuant to the exclusionary provision in section 9-104(i). 320 N.W.2d at 726.

[64] *See, e.g.*, City of Vermillion v. Stan Houston Equip. Co., 341 F. Supp. 707, 711 (D.S.D. 1972) (although section 9-104(i) expressly excludes set-offs from filing provisions of Code, set-off has no priority over secured claim); Citizens Nat'l Bank v. Mid-States Dev. Co., 380 N.E.2d 1243, 1247 (Ind. Ct. App. 1978) (narrow purpose of section 9-104 requires that secured party prevail over party with right to set-off pursuant to section 9-201); Coachman Indus. Inc. v. Security Trust & Sav. Bank, 329 N.W.2d 648, 650 (Iowa 1983) (section 9-104(i) "does not mean . . . that a right of set-off automatically has priority over security interests"); Morris Plan Co. v. Broadway Nat'l Bank, 598 S.W.2d 557, 560 (Mo. Ct. App. 1980) (application of narrow view of section 9-104(i) recognizing secured party's priority over unsecured with right to set-off) (citing Universal C.I.T. Credit Corp. v. Farmers Bank, 358 F. Supp. 317 (E.D. Mo. 1973)); Associates Discount Corp. v. Fidelity Union Trust Co., 111 N.J. Super. 353, 268 A.2d 330, 332 (1970) (section 9-104(i) does not mean that a bank "may abrogate a perfected security interest simply by having a right to and opportunity for a set-off"); First Wis. Nat'l Bank v. Midland Nat'l Bank, 76 Wis. 2d 662, 251 N.W.2d 829, 831-32 (1977) (party with perfected security interest in certificates of deposit has priority over bank with right to set-off).

this exclusionary provision of the Code.[65] Those jurisdictions adhering to the narrow view of section 9-104(i) — that its only function is to declare that a set-off is not a security interest — generally take the position that a right of set-off is subject to the priority provisions of Article 9 and, by virtue of section 9-201, is generally not given priority over a perfected security interest.[66] The broad view, that section 9-104(i) renders Article 9 inapplicable in resolving disputes between secured parties and those claiming set-offs, invariably results in a finding that the rights of a secured party to the funds represented by a non-negotiable certificate of deposit are subordinate to the issuer's rights of set-off.[67] The Mississippi Supreme Court, persuaded by Minnesota and Florida state court decisions, chose this latter construction of section 75-9-104(i). Without specifically mentioning section 75-9-104(i), the court stated:

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[65] *See generally* Skilton, *The Secured Party's Rights in a Debtor's Bank Account Under Article 9 of the Uniform Commercial Code*, 1977 So. Ill. L.J. 120, 203-04 (controversy with regard to meaning of 9-104(i) basically focuses on two differing views: the "narrow view" and the "wider view").

[66] The narrow view, chiefly identified with Professor Gilmore's explanation of the history of section 9-104(i), is a construction of 9-104(i) to mean only that a set-off is not a security interest. Skilton, *supra* note 65, at 203. *See* National Acceptance Co. v. Virginia Capital Bank, 498 F. Supp. 1078, 1083 (E.D. Va. 1980) ("courts find support for this conclusion in the remarks of a principal reporter of Article 9, Professor G. Gilmore"); Associates Discount Corp. v. Fidelity Union Trust Co., 11 N.J. Super. 353, 268 A.2d 330, 332 ("all this section means is that a right of set-off may exist in a creditor who does not have a security interest") (citing G. Gilmore, Security Interests in Personal Property 315-16 (1965)). The language most often quoted in support of this narrow construction of section 9-104(i) was provided by Professor Gilmore:

> This exclusion is an apt example of the absurdities which result when draftsmen attempt to appease critics by putting into a statute something that is not in any sense wicked but is hopelessly irrelevant. Of course, a right of set-off is not a security interest and has never been confused with one. The statute might as appropriately exclude fan dancing. A bank's right of set-off against a depositor's account is often loosely referred to as a "banker's lien," but the lien usage has never led anyone to think that the bank held a security interest in the bank account.

G. Gilmore, *supra*, at 315-16.

[67] Those jurisdictions adhering to the wider view generally recognize the priority of the party asserting the right to set-off on the basis that 9-104(i) renders *all* provisions of Article 9 inapplicable to set-offs, including the rules governing priority. *See* Skilton, *supra* note 65, at 203-04 (wider view finds no provisions of Article 9 applicable to set-offs; exclusion applies to keystone provision of section 9-201). *See, e.g.*, State Bank of Rose Creek v. First State Bank, 320 N.W.2d 723, 726 (Minn. 1982) (application of wider view; bank's set-off rights as to funds represented by certificate of deposit have priority over rights of secured party).

> We are of the opinion the exclusion from Article 9 protection means that the claimant to a right of set-off is not precluded from this right merely because another claimant to the security has perfected its interest in the security by taking possession of it. We again state the right of set-off is separate from the priority provision of Article 9.[68]

A finding that the priority provisions of Article 9 are inapplicable to the resolution of this controversy would, without more, provide sufficient support for the court's holding. Therefore, it is puzzling why the court found it necessary to proclaim immediately afterwards, without supporting authority, that the plaintiff's perfected security interest was in the certificate itself rather than in the funds flowing from the certificate.[69] Neither of the cases cited by the court in support of its decision make such a distinction.[70] The view taken by the Mississippi Supreme Court renders a properly perfected security interest in a certificate of deposit virtually worthless in many situations. In a factual situation very similar to that in *Bank of Crystal Springs,* the Wisconsin Supreme Court found that a security interest in certificates of deposit "includes and extends to unidentified funds on deposit" at the issuing bank obligated to pay the certificates when due.[71] In that case, the original holder of two certificates of deposit assigned and transferred them to the assignee as security for a loan. Prior to maturity of the certificates, the debtor/assignor defaulted on his obligation to the assignee as well as to the issuer/bank. Upon presentation of the certificates, the issuer refused to honor them on grounds that the funds represented by the certificates were used to set off the amount owed by the assignor. The issuer argued that the security interest should not extend to the funds paid for the certificates. The Wisconsin court rejected the issuer's argument and stated that "[a] contrary holding

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[68] 427 So. 2d at 971.

[69] The court stated:

> We emphasize that the certificate of deposit and the funds represented by it are independent legal entities. Appellant's perfected security interest is in the certificate of deposit, an instrument in U.C.C. parlance. Appellee has exercised its right of setoff against the funds, not the certificate.

Id. at 971.

[70] The court cited State Bank of Rose Creek v. First State Bank, 320 N.W.2d 723 (Minn. 1982) and Citizens Nat'l Bank v. Bornstein, 374 So. 2d 6 (Fla. 1979). *Id.* at 971. Neither of these opinions support the view that a security interest in a certificate of deposit extends only to the certificate, not the funds represented by the certificate.

[71] First Wisconsin Nat'l Bank v. Midland Nat'l Bank, 76 Wis. 2d 662, 251 N.W.2d 829, 832 (1977).

would mean a security interest in a certificate of deposit itself would be worthless unless such an interest extended to funds in the bank used to pay the certificates upon maturation."[72] The logic of this position is evident.

B. "Good Faith": Subjective Versus Objective Standard

Section 75-1-208 of the Mississippi Commercial Code places a "good faith" limitation on a party's right to accelerate payments or require additional collateral within the terms of an agreement allowing such an act " 'at will' or 'when he deems himself insecure.' "[73] The significant term within this statutory provision is "good faith." In *Black v. Peoples Bank and Trust Co.*,[74] the Mississippi Supreme Court addressed the issue of whether "good faith," as required by section 75-1-208, should be determined according to a purely subjective standard or by the objective reasonableness of the creditor's belief that the prospect of payment or performance has been impaired.

The plaintiff, Robert Black, bought a truck from Dye and Pierce Motors on December 22, 1979. Peoples Bank and Trust Company purchased the installment contract by which the vehicle was financed and later repossessed the truck when the plaintiff failed to pay the first two installments. Although the plaintiff subsequently tendered past due amounts, the defendant refused to release the vehicle until the entire

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[72] *Id.* at 832-33. Unlike the situation in *Bank of Crystal Springs*, the certificates were negotiable and it was not contested that the assignee notified the issuing bank of the security interest. However, it does not appear from the language of the decision that these distinctions had any bearing on the court's finding that the security interest extended to the funds represented by the certificates. The court stated, in pertinent part:

> What is relevant and controlling, . . . is not whether the security interest is as to funds "on their way in." Rather, once the security interest attaches — here to the certificates of deposit — that secured interest is as to unidentified funds, not specified by serial numbers, on deposit at the depository bank. . . . [W]hat determines the priority of the security interest is that it had attached at the time of offset. . . .

Id. at 833.

[73] MISS. CODE ANN. § 75-1-208 (1972) provides:

> A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.

Id.

[74] 437 So. 2d 26 (Miss. 1983).

accelerated amount of the debt was paid. The defendant contended that acceleration of the debt was justified, based on a feeling of insecurity resulting from newly-acquired knowledge that the plaintiff's son, Ronnie Black, was responsible for making the payments.[75]

The court relied on early Mississippi precedent and adopted the pre-Code *objective* standard, which allowed "[a] creditor [to] 'proceed upon such circumstances of presently apparent danger as would furnish probable cause for the belief that the security was unsafe when viewed in good faith by a man of reasonable prudence.' "[76] Section 75-1-201(19) of the Code provides that "subject to additional definitions contained in the subsequent chapters of this code which are applicable to specific chapters or parts thereof, and unless the context otherwise requires, . . . '[g]ood faith' means honesty in fact in the conduct or transaction concerned."[77] This language suggests that the drafters of the Code intended a standard for measuring good faith that would be wholly subjective.[78] To adopt an objective standard for measuring good faith within the meaning of section 75-1-208 would require a judicial modification or an amendment of either section 75-1-201(19) or section

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[75] *Id.* at 28-29.

[76] *Id.* at 29 (citing Universal C.I.T. Credit Corp. v. Turner, 56 So. 2d 800 (Miss. 1952)). *Turner* involved repossession of a car under a conditional sales contract which contained an insecurity clause. Quoting from Commercial Credit Co. v. Cain, 190 Miss. 866, 871, 1 So. 2d 776, 777, 778 (1941), the *Turner* court stated that Mississippi had adopted, and would continue to use, an objective measure of a creditor's actions under an insecurity clause. 56 So. 2d at 802. The court also ruled that when payment of the balance due, including collection charges, was tendered to the creditor after repossession, all reasons for insecurity on the creditor's part disappeared. *Id.* at 802.

[77] MISS. CODE ANN. § 75-1-201(19) (1972).

[78] *See, e.g.*, Farmers Coop. Elevator, Inc. v. State Bank, 236 N.W.2d 674, 678 (Iowa 1975) ("Decisions construing § 1-201 (19) of the Code overwhelmingly agree that the test of good faith under that section is a wholly subjective one of honesty.") In this case the plaintiff argued that the bank's election to accelerate under § 1-208 required "not only honesty in fact but also a *reasonable* belief in impairment of the prospect of payment." *Id.* (emphasis added). The Iowa Supreme Court rejected this objective standard noting that "[w]here the Uniform Commercial Code requires for good faith more than 'honesty in fact' it explicitly so states." *Id.* (citing §§ 2-103(1)(b), 3-406, 7-404 and 8-318).

But see J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 26-3, at 959 (1972) (Code standard located "somewhere between a strict objective test (reasonable prudent man) and a thoroughly subjective one (whim)"). White and Summers note that "[t]he draftsmen apparently intended an objective standard." Quoting Professor Gilmore in support of this standard, they stated further that § 1-208 "means that the 'creditor has the right to accelerate if under all the circumstances a reasonable man, motivated by good faith, would have done so.' " *Id.* (citing 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 43-4, at 1197 (1965)).

75-1-208.[79] Although other states have adopted the objective-reasonableness measure of the creditor's good faith,[80] the statutory language in section 1-201(19)[81] appears to have caused the majority of states having considered the issue to adopt the subjective standard,[82] commonly referred to as the "pure heart and empty head" standard.[83] The latter appears to be the correct result, since regardless of the apparent equity

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[79] *See, e.g.*, Universal C.I.T. Credit Corp. v. Shepler, 164 Ind. App. 516, 329 N.E.2d 620, 623 (1975) (subjective test must be modified for good faith provisions of sections 1-208 and 1-201(10) to be effective) (citing J. WHITE & R. SUMMERS, *supra* note 78, at 959).

[80] *See, e.g.*, Sheppard Fed. Credit Union v. Palmer, 408 F.2d 1369, 1371, 1371 n.2 (5th Cir. 1969) (creditor can accelerate under section 1-208 if a " 'reasonable man, motivated by good faith, would have done so.' ") (quoting G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 43.4, at 1197 (1965); Kupka v. Morey, 541 P.2d 740, 747 n.5 (Alaska 1975) (reasonable, good faith belief of impairment required prior to invocation of insecurity clause allowing termination of lease-purchase agreement); Universal C.I.T. Credit Corp. v. Shepler, 164 Ind. App. 516, 329 N.E.2d 620, 623-24 (1975) (rejection of section 1-201(19) subjective standard in favor of objective-reasonable-man standard); Commercial Credit Equip. Corp. v. Elliott, 414 S.W.2d 35, 44 (Tex. Civ. App. 1967) (application of pre-code reasonable man standard).

[81] MISS. CODE ANN. § 75-1-201(19) (1972) provides: "Subject to additional definitions contained in the subsequent chapters of this code which are applicable to specific chapters or parts thereof, and unless the context otherwise requires, in this code . . . (19) 'Good faith' means *honesty in fact* in the conduct or transaction concerned." *Id.* (emphasis added).

[82] *See, e.g.*, Ginn v. Citizens & Southern Nat'l Bank, 145 Ga. App. 175, 243 S.E.2d 528, 530 (1978) ("good faith" belief of insecurity under section 1-208 requires subjective measure of " 'honesty in fact' " defined in section 1-201(19)); Farmers Coop. Elevator, Inc. v. State Bank, 236 N.W.2d 674, 678 (Iowa 1975) (acceleration under section 1-208 not in "good faith" as measured by wholly subjective standard of honesty in fact defined in section 1-201(19)); Fort Knox Nat'l Bank v. Gustafson, 385 S.W.2d 196, 200 (Ky. 1964) (subjective standard is proper measure of good faith); McKay v. Farmers & Stockmans Bank, 92 N.M. 181, 585 P.2d 325, 326 (1978) ("New Mexico courts have not defined 'good faith' beyond the statutory definition" of "honesty in fact in conduct or transaction concerned" of section 1-201(19)); Van Horn v. Van De Wol, Inc., 6 Wash. App. 959, 497 P.2d 252, 253 (Wash. Ct. App. 1972) ("good faith" belief of insecurity justifying acceleration under section 1-208 requires subjective measure of honesty in fact defined under section 1-201(19)).

The *Van Horn* opinion noted that this "pure heart and empty head" standard was favored over the objective standard as early as Gill v. Cubitt, 107 Eng. Rep. 806 (1824). *Van Horn*, 497 P.2d at 253 (citing Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COL. L. REV. 798, 812, 812 n.99 (1958)).

The above-cited cases are certainly not an exhaustive representation of all the jurisdictions adhering to the purely subjective standard for measuring "good faith" under the Code. For a more thorough listing of authorities supporting this standard, see cases cited in Farmers Coop. Elevator, Inc. v. State Bank, 236 N.W.2d 674, 678 (Iowa 1975).

[83] 437 So. 2d at 29; *see* Braucher, *supra* note 82, at 812, 812 n.99 (subjective standard referred to as "pure heart and empty head").

of an objective measure,[84] to adopt such a measure when a subjective one was intended is unquestionably outside the realm of judicial authority.[85] The court cited pre-Code Mississippi authority applying this objective standard[86] and concluded that "[w]e are of the opinion that this standard is the better rule of law and hereby adopt it."[87] The court's sole function in this regard was to interpret the measure of "good faith" as intended by the legislature and not to adopt, in its "opinion," the "better rule." Perhaps it would have been less of an intrusion upon legislative powers if the court had simply distinguished this objective measure of "good faith" as coming within the escape clause of section 75-1-201, providing for a wholly subjective measure "unless the context otherwise requires."[88]

C. *The Farmer as Merchant Under the Commercial Code*

In *Vince v. Broome*[89] the Mississippi Supreme Court held that "farmers as an occupation may be a merchant class where their particular factual situation falls into the definition of merchant" in section 75-2-104 of the Mississippi Commercial Code.[90] *Vince* is the first case

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[84] *See, e.g., Black*, 437 So. 2d at 29 (subjective standard gives creditor too much latitude and imposes too stringent a burden of proof on debtor). The court quoted language from the Indiana Court of Appeals which criticized the subjective standard as being subject to arbitrary abuse placing an unreasonable burden on the "debtor to prove the non-existent state of mind of the creditor." *Id.* (quoting Universal C.I.T. Credit Corp. v. Shepler, 164 Ind. App. 516, 329 N.E.2d 620, 625-26 (1975)).

[85] *See* MISS. CONST. art. 1, § 1 (distribution of powers to legislative, judicial, and executive branches); *id.* art. 4, § 33 (legislative power of this state vested in legislature); *id.* art. 1, § 2 (no branch of government can exercise the powers of another branch). *See also, e.g.*, Gaudet v. Natchez, 43 So. 2d 900, 900 (1950) (court lacks power to either repeal valid statute or enact new statute).

[86] 437 So. 2d at 29, (citing Universal C.I.T. Credit Corp. v. Turner, 56 So. 2d 800 (Miss. 1952) (officially unreported decision); Commercial Credit Co. v. Cain, 190 Miss. 866, 1 So. 2d 776 (1941).

[87] 437 So. 2d at 29-30.

[88] MISS. CODE ANN. § 75-1-201 (1972).

[89] 443 So. 2d 23 (Miss. 1983). For a more complete discussion of the *Vince* decision and its legal background, see Note, 54 MISS. L.J. 175 (1984).

[90] 443 So. 2d at 25. MISS. CODE ANN. § 75-2-104(1) (1981) provides:

> 'Merchant' means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

Id.

in which the Mississippi Supreme Court has classified a farmer as a merchant under the Code.

In this case a purchaser of cattle, plaintiff J.R. Vince, sought recovery from the seller of the cattle,[91] defendant J.D. Broome, for breach of implied warranty of merchantability[92] of the cattle pursuant to section 75-2-314 of the commercial code.[93] Before determining whether the seller was a "merchant with respect to goods of that kind,"[94] thus subjecting the sale to implied warranty status under section 75-2-314, the court appropriately addressed the issue of whether the farming occupation was totally exempt from merchant status as defined in section 75-2-104(1).[95]

Acknowledging the absence of any original legislative history addressing the farmer/merchant issue,[96] the court noted that enactment of the amendment to section 75-2-314, excluding the sale of cattle, hogs, and sheep from the implied warranty provision,[97] implies "that a farmer may factually in a particular case be considered a 'merchant' under Code definition (section 75-2-104)."[98] To further support the classification of a farmer as a merchant, the court reasoned that the dollar volume of some farming operations constitutes "multicommercial transactions," and farmers engaged in such transactions are "generally considered to be agribusiness persons."[99]

After concluding that persons in the farming occupation "may be a merchant class where their particular factual situation falls into the

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[91] 443 So. 2d at 24. The plaintiff also joined Southeast Mississippi Livestock Association as a defendant in this suit. The County Court of Forrest County sustained this defendant's motion for a directed verdict and no appeal was taken. *Id.* at 25, 25 n.2.

[92] *Id.* at 24. The suit was instituted in the County Court of Forrest County. After a verdict was returned for the plaintiff, the defendant appealed and the circuit court reversed on grounds that the Uniform Commercial Code did not apply to the sale of livestock and that, as a matter of law, a farmer was not a merchant in Code terminology. *Id.*

[93] MISS. CODE ANN. § 75-2-314(1) (1981) provides in part: "A warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." *Id.*

Note that section 75-2-314(4), excluding the sale of cattle, hogs and sheep from operation of this statute, became effective July 1, 1981. The transaction from which the present action resulted was consummated on May 19, 1980 and is, therefore, outside the operation of section 75-2-314(4). 443 So. 2d at 24 n.1.

[94] MISS. CODE ANN. § 75-2-314(1) (1981).

[95] *Id.* § 75-2-104(1) (1972).

[96] 443 So. 2d at 25.

[97] *See supra* note 93.

[98] 443 So. 2d at 25.

[99] *Id.* The court also noted that farming operations performed by casual and inexperienced sellers are not to be included within the merchant definition. *Id.*

definition of merchant as defined in . . . section 75-2-104," the court addressed the issue of whether this particular farmer/seller was a "merchant with respect to goods of that kind" within the meaning of section 75-2-314.[100] If a seller is found to be such a merchant, section 75-2-314 deems him to have impliedly warranted the merchantability of the goods sold.[101]

Note that there are several definitions of the term merchant within section 75-2-104.[102] The first reference made to the term provides that a merchant is "[a] person who deals in goods of the kind." This is the type of merchant apparently intended to come under the implied warranty provisions of section 75-2-314, which makes reference to a "merchant with respect to goods of that kind." The Mississippi Supreme Court noted that the definition of merchant under section 75-2-314 "is more limited than the general definition contained in section 75-2-104."[103] With respect to the other definitions of merchants contained in section 75-2-104, the court found that they "do not apply to implied warranty suits."[104] Under the particular facts of this case, the court concluded that the cattle seller was a " 'merchant dealing in goods of that kind' " subject to the implied warranty provisions of section 75-2-314.[105]

Shane F. Langston

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[100] *Id.*

[101] *See* MISS. CODE ANN. § 75-2-314 (1981).

[102] *See* MISS. CODE ANN. § 75-2-104(1) (1972) ("deals in goods of the kind *or* . . . by his occupation holds himself out as having knowledge *or* skill peculiar to the practices or goods . . . in the transaction *or* to whom such knowledge or skill may be attributed by his employment of an agent . . . who by his occupation holds himself out as having such knowledge . . .") (emphasis added).

[103] 443 So. 2d at 26 (citing Sieman v. Alden, 34 Ill. App. 3d 961, 341 N.E.2d 713 (1975)).

[104] 443 So. 2d at 27.

[105] Finding the seller to be a " 'merchant dealing in goods of that kind' " under section 75-2-314, the court emphasized the size, extent and duration of the seller's cattle operations and the experience and knowledge of the seller. In reference to the facts that the seller only sold what he raised and was extensively involved in other businesses, the court noted that these facts were immaterial to the determination of the seller's status. 443 So. 2d at 27.

CRIMINAL LAW

The major areas in criminal law in which the Mississippi Supreme Court rendered decisions that were not considered noteworthy were evidence,[1] statutory interpretation,[2] remarks of counsel,[3] indictments,[4]

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[1] Bell v. State, 443 So. 2d 16 (Miss. 1983) (trial judge may restrict evidence of peacefulness of murder defendant); Pickett v. State, 443 So. 2d 796 (Miss. 1983) (in rape case where consent is defense, state may introduce evidence as to the truthfulness and veracity of victim); Williams v. State, 440 So. 2d 312 (Miss. 1983) (introduction of hospital records rather than testimony of the makers did not violate the right of confrontation when the facts therein were proved by other evidence); Gholar v. State, 441 So. 2d 113 (Miss. 1983) (inconsistencies in accounts of shooting were sufficient to allow a jury determination whether malice existed for murder); Edwards v. State, 441 So. 2d 84 (Miss. 1983) (M'Naghten rule resolves sanity in the guilt phase); Gandy v. State, 438 So. 2d 279 (Miss. 1983) (use of telephone computer printouts in evidence requires state show equipment standard, entries made in regular course of business and trustworthiness of records; state need not go into intricacies of computer equipment); Oates v. State, 437 So. 2d 441 (Miss. 1983) (statement of defendant admissible as part of the res gestae when made during criminal activity which implicated him in other activity); Hubbard v. State, 437 So. 2d 430 (Miss. 1983) (restriction on recross examination is not a constitutional violation; without proper foundation, impeachment by prior inconsistent statements may be denied; weapons not used in the crime may be admitted into evidence; admission of photographs of deceased within discretion of judge; failure of prosecution to give defendant name of expert not reversible error where defense allowed to interview expert before testimony); Pennington v. State, 437 So. 2d 37 (Miss. 1983) (disallowing attorney's attempt to make a record is not per se reversible error, especially where the court can ascertain the purpose of the proffered testimony from the record; evidence as to polygraph test is inadmissible; objection must be made before the witness answers a question as to the polygraph test rather than waiting to determine if a favorable answer results); Sloane v. State, 437 So. 2d 16 (Miss. 1983) (use of mug shots as evidence constitutes reversible error when three requirements are not met: demonstrable need, photos do not imply criminal record, and manner of introduction does not draw attention to their source); Wilson v. State, 433 So. 2d 1142 (Miss. 1983) (trial court erred by allowing fruits of illegal search into evidence); Alford v. State, 433 So. 2d 940 (Miss. 1983) (nurse's testimony as to intoxication is privileged but because cumulative of other evidence not reversible error to admit; prosecution may not reply to defendant's rebuttal by mentioning the physician-patient privilege); Lacy v. State, 432 So. 2d 1205 (Miss. 1983) (price tags may be introduced as evidence); Hill v. State, 432 So. 2d 427 (Miss. 1983) (upon showing of unconstitutional conduct by government in securing evidence, government must prove, by a preponderance, that an exception to the exclusionary rule applies); Davis v. State, 431 So. 2d 468 (Miss. 1983) (elicitation of incriminating statements from defense witness to prove prior inconsistent statement not grounds for mistrial); Mason v. State, 430 So. 2d 857 (Miss. 1983) (evidence indicating other crimes may be admissible as part of res gestae); Campbell v. State, 430 So. 2d 851 (Miss. 1983) (state has no duty to discover all possible exculpatory evidence); Smith v. State, 430 So. 2d 406 (Miss. 1983)

(in-court identification not excluded unless shown to be tainted by some out-of-court identification so that there is a substantial likelihood of misidentification); Pearson v. State, 428 So. 2d 1361 (Miss. 1983) (introduction of perjured testimony unrelated to to defendant's culpability not basis for mistrial); Hall v. State, 427 So. 2d 957 (Miss. 1983) (confession, given voluntarily, admissible under Brown v. Illinois, 422 U.S. 590 (1975), despite equivocality of arrest); Bryant v. State, 427 So. 2d 131 (Miss. 1983) (mere possession of narcotics, without more, not evidence of intent to deliver); Palmer v. State, 427 So. 2d 111 (Miss. 1983) (statements by laymen that defendant was insane when he committed crime do not raise sufficient question of sanity for issue to be submitted to jury); Williams v. State, 427 So. 2d 100 (Miss. 1983) (victim's outcry after being raped is admissible; delay in reporting the rape, if excusable, does not affect its admissibility); Taylor v. State, 426 So. 2d 775 (Miss. 1983) (mug shots admissible if identifying marks properly removed); Carleton v. State, 425 So. 2d 1036 (Miss. 1983) (facts inferable from evidence may be included in hypothetical proposed to witness); Young v. State, 425 So. 2d 1022 (Miss. 1983) (prosecution may impeach defendant by prior conviction although it is alleged the prior conviction was fraudulently obtained).

[2] Irving v. State, 441 So. 2d 846 (Miss. 1983) (ex post facto clause of U.S. Constitution not violated by application of change in trial procedure instituted after the offense); Allen v. State, 440 So. 2d 544 (Miss. 1983) (judge may impose sentence under statute in effect at time of offense although statute amended before sentencing); Carleton v. State, 438 So. 2d 278 (Miss. 1983) (court distinguished two statutes both of which apply to escape of prisoners); West v. State, 437 So. 2d 1212 (Miss. 1983) (attempted sexual battery requires attempted penetration); Ransom v. State, 435 So. 2d 1169 (Miss. 1983) (in computing speedy trial time under MISS. CODE ANN. § 99-17-1, the day of arraignment must be excluded); Harper v. State, 434 So. 2d 1367 (Miss. 1983) (fear element required in robbery is satisfied by anticipation of physical injury); Davis v. State, 431 So. 2d 468 (Miss. 1983)(to determine date of eligibility for parole, multiply number of life sentences by ten years); Ervin v. State *ex rel.* Mississippi Bureau of Narcotics, 434 So. 2d 1324 (Miss. 1983) (under MISS. CODE ANN. § 41-29-179 on forfeiture of automobile to the state, state bears burden of proof by a preponderance that owner knew of or consented to illegal use); Williams v. State, 427 So. 2d 100 (Miss. 1983) (officer may arrest under MISS. CODE ANN. § 99-3-7 without warrant although offense not committed in physical presence of officer); Brady v. State, 425 So. 2d 1347 (Miss. 1983) (Mississippi Speedy Trial Act not violated by a two-day delay when defendant is late in filing notice of insanity defense, thereby necessitating continuance, to which defendant did not object, for a mental examination).

[3] Caldwell v. State, 443 So. 2d 806 (Miss. 1983) (court gave no relief even though argument by prosecutor was reversible error in prior case law); Edwards v. State, 441 So. 2d 84 (Miss. 1983) (counsel inviting inappropriate remarks from opposing counsel may not complain); Madlock v. State, 440 So. 2d 315 (Miss. 1983) (reference by prosecutor in closing argument to defendant's failure to call corroborating witness constitutes reversible error); Lee v. State, 435 So. 2d 674 (Miss. 1983) (not error to comment on defendant's total failure to dispute evidence produced by the state); Wilson v. State, 433 So. 2d 1142 (Miss. 1983) (prosecuting attorney not allowed to comment on defendant's failure to testify); Gilliard v. State, 438 So. 2d 576 (Miss. 1983) (district attorney's statement that "life is ten years" not reversible error where defense attorney made similar argument during closing); Carleton v. State, 425 So. 2d 1036 (Miss. 1983) (prosecuting attorney should refrain from going beyond the record in closing argument).

[4] Stinson v. State, 443 So. 2d 869 (Miss. 1983) (harmless error to issue and try a

instructions,[5] pleas and sentences,[6] search and seizure,[7] mistrial and

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multiple indictment for a single transaction); Sanders v. State, 439 So. 2d 1271 (Miss. 1983) (where co-indictees are all indictable as principals, the term "conspiracy" does not have to be stated in the indictment); Gandy v. State, 438 So. 2d 279 (Miss. 1983) (any defect is waived unless defendant demurs to indictment before jury is impaneled); Bingham v. State, 434 So. 2d 220 (Miss. 1983) (amendment of indictment proper where changed to reflect person intended by grand jury); Evans v. State, 425 So. 2d 1043 (Miss. 1983) (indictment may be amended to reflect proper name of victim).

[5] Pickett v. State, 443 So. 2d 796 (Miss. 1983) (failure to give best instruction does not constitute reversible error; granting of alleged abstract instruction not reversible error where such instruction could not have confused or misled the jury); Irving v. State, 440 So. 2d 846 (Miss. 1983) (in sentencing hearing after murder conviction, the aggravating circumstances instruction need not define "robbery," "pecuniary gain," or "heinous, atrocious, or cruel;" a "mercy instruction" is not required but is not error if given); Hubbard v. State, 437 So. 2d 430 (Miss. 1983) (where the evidence is sufficient to sustain a murder conviction, a manslaughter instruction is allowed although defendant pleads self-defense; bailbondsman instruction not error); Perry v. State, 435 So. 2d 680 (Miss. 1983) (cumulative instructions not required); Colburn v. State, 431 So. 2d 1111 (Miss. 1983) (instruction on lesser included offense given only if supported by the evidence); Ervin v. State, 431 So. 2d 130 (Miss. 1983) (it is defense attorney's duty in closing argument to point out to jury that they might infer from absence of state's witness that the witness' testimony would not support state's contentions); Erving v. State, 427 So. 2d 701 (Miss. 1983) (in the circumstantial instruction, the essential phrase is "and to the exclusion of every other reasonable hypothesis," and the phrase "to a moral certainty" is interchangeable with "beyond a reasonable doubt"); Thomas v. State, 426 So. 2d 795 (Miss. 1983) (failure to grant coerced confession instruction reversible error); Murphy v. State, 426 So. 2d 786 (Miss. 1983) ("Allen" instruction by the trial judge constitutes reversible error); Carleton v. State, 425 So. 2d 1036 (Miss. 1983) (on particular facts, harmless error to give instruction whereby malice aforethought inferred from unlawful and deliberate use of deadly weapon).

[6] Tiller v. State, 440 So. 2d 1001 (Miss. 1983) (defendant entitled to evidentiary hearing where guilty plea may have been entered on mistaken advice of counsel); Sanders v. State, 439 So. 2d 1271 (Miss. 1983) (evidentiary hearing required when defendant attacks guilty plea as involuntary unless attack "manifestly-without-merit;" at hearing burden is on defendant to prove by clear and convincing evidence that guilty plea was not voluntary); Lee v. State, 437 So. 2d 1208 (Miss. 1983) (when defendant is transferred to another county before arraignment and the transfer is accompanied by a detainer from the first county, a judge of the second county may give credit for time served in the first county); Caylor v. State, 437 So. 2d 444 (Miss. 1983) (defendant competent; judge used correct procedure in accepting a guilty plea); Ball v. State, 437 So. 2d 423 (Miss. 1983) (orders for consecutive sentences should specify next sentence to begin at end of imprisonment for preceding conviction); Ford v. State, 437 So. 2d 13 (Miss. 1983) (sentence improper if based partially on unverified statement received from jury member from previous trial); Tokman v. State, 435 So. 2d 664 (Miss. 1983) (under death penalty statute, elements of crime may be introduced as aggravating circumstances although overlapping); Dalgo v. State, 435 So. 2d 628 (Miss. 1983) (defendant, sentenced to life under recidivist statute, received a proper sentencing hearing where he failed to request additional hearing or refute evidence of prior convictions); Campbell v. State, 430 So. 2d 851 (Miss. 1983) (neither circuit judge nor circuit clerk has authority to impose a new or

continuance,[8] discovery,[9] directed verdict,[10] juries,[11] and

different sentence from that imposed at term); Segarra v. State, 430 So. 2d 408 (Miss. 1983) (time spent on parole does not count as time served toward completion of sentence); Davis v. State, 439 So. 2d 262 (Miss. 1983) (petitioner serving three consecutive life sentences eligible for parole after thirty years minus good time); Williams v. State, 427 So. 2d 100 (Miss. 1983) (state may inadvertently waive possibility of a death sentence); Jackson v. State, 426 So. 2d 405 (Miss. 1983) (much leeway should be accorded defendant in presenting evidence material to motives of both defendant and victim); Peden v. State, 425 So. 2d 1356 (Miss. 1983) (failure by the state to present all persons present at the time of the confession at the *Agee* hearing is reversible error).

[7] Penick v. State, 440 So. 2d 547 (Miss. 1983) (under Mississippi Constitution, consent to pre-arrest search valid only if defendant knew of right to refuse; illegal arrest makes otherwise valid consent ineffective); Gandy v. State, 438 So. 2d 279 (Miss. 1983) (reasonable belief establishes probable cause); Lee v. State, 435 So. 2d 674 (Miss. 1983) (court applied new "totality of the circumstances" standard for determining probable cause on basis of information from informant); Wilson v. State, 433 So. 2d 1132 (Miss. 1983) (police cannot enter defendant's home without a warrant to make felony arrest, absent exigent circumstances); Murphy v. State, 426 So. 2d 786 (Miss. 1983) (search warrant not necessary to search public place; confession may voluntarily be made after written statement indicates wish to remain silent).

[8] Leflore v. State, 439 So. 2d 675 (Miss. 1983) (presence of bailiff in jury room after jury has retired not necessarily grounds for mistrial); Forbes v. State, 437 So. 2d 59 (Miss. 1983) (continuance within trial judge's discretion); Taylor v. State, 426 So. 2d 775 (Miss. 1983) (variance in testimony in subsequent trial not ground for mistrial).

[9] Morris v. State, 436 So. 2d 1381 (Miss. 1983) (defendant can discover any statement made to police whether or not the state believes it relates to case at bar; failure to disclose discoverable statements by defendant reversible error irrespective of prejudice; under Rule 4.06, request for discovery must be in writing to be enforceable); Wilson v. State, 433 So. 2d 1142 (Miss. 1983) (confidential informant's name need not be disclosed where he did not participate in crime and his testimony was not relevant); Spots v. State, 427 So. 2d 127 (Miss. 1983) (prosecution's failure to produce discoverable materials not reversible error where defense was allowed time to study evidence and interview witnesses); Jackson v. State, 426 So. 2d 405 (Miss. 1983) (reversible error for state to fail to disclose confession by defendant).

[10] Colvin v. State, 431 So. 2d 1134 (Miss. 1983) (state's case sufficient to withstand motion for directed verdict in murder trial); Peden v. State, 425 So. 2d 1356 (Miss. 1983) (any error in denial of a motion for directed verdict is waived by failure to renew the motion at the conclusion of all evidence).

[11] Pickett v. State, 443 So. 2d 796 (Miss. 1983) (failure to make timely objection to manner of presenting array of jurors waives any defect, especially in absence of prejudice or fraud); Jones v. State, 442 So. 2d 919 (Miss. 1983) (jury verdict upheld unless unsupported by the evidence); Mason v. State, 440 So. 2d 318 (Miss. 1983) (use of peremptory challenges to exclude persons of a particular race from jury did not violate Constitution); Groseclose v. State, 440 So. 2d 297 (Miss. 1983) (although expert testimony overwhelmingly establishes defendant was insane at time of offense, jury verdict of guilty may be upheld on basis of lay testimony as to sanity; concurrence explores possibility of replacing insanity defense with consideration of sanity at sentencing phase); Forbes v. State, 437 So. 2d 59 (Miss. 1983) (jury members not per se unable to try case fairly because of personal experience with crime).

miscellaneous.[12]

I. Right to Effective Assistance of Counsel

The sixth amendment right to effective assistance of counsel[13] provided the basis for the Mississippi Supreme Court's decision in *Calla-*

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[12] Cooper v. State, 439 So. 2d 1277 (Miss. 1983) (habeas corpus petition denied since inmate ineligible for parole is not entitled to administrative earned-time credit in reduction of sentence); Cobb v. State, 437 So. 2d 1218 (Miss. 1983) (probation with terms that defendant stay 125 miles away from the county is within sound discretion of judge); Greenlee v. State, 437 So. 2d 1010 (Miss. 1983) (judge may refuse defendant's motion for mental examination when one has already been made and judge has observed defendant in court); Curlee v. State, 437 So. 2d 1 (Miss. 1983) (allowing defendant to proceed pro se within discretion of trial judge and not reversible error, particularly where judge ordered counsel to remain at defendant's table); Richardson v. State, 436 So. 2d 790 (Miss. 1983) (uncorroborated testimony of alleged accomplice may be sufficient to support guilty verdict; error to exclude testimony of defendant's attorney as to prior inconsistent statements of a witness); Pruett v. State, 431 So. 2d 1101 (Miss. 1983) (Mississippi court had jurisdiction of capital murder case where kidnapping began in Mississippi and ended in Alabama with killing of victim).

[13] The sixth amendment to the United States Constitution provides that "[I]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The sixth amendment right to counsel was extended to the states by incorporating the sixth amendment into the due process clause of the fourteenth amendment. Gideon v. Wainwright, 372 U.S. 335, 343 (1963).

The sixth amendment guarantees a defendant the right to have counsel present at critical phases of litigation. The United States Supreme Court has identified as critical stages those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel. Coleman v. Alabama, 399 U.S. 1, 7 (1970). To determine if a stage is critical, the court must examine whether potential substantial prejudice to a defendant's rights inheres in a particular situation and whether counsel could help avoid such prejudice. United States v. Wade, 388 U.S. 218, 227 (1967); *see, e.g.*, Escobedo v. Illinois, 378 U.S. 478, 491 (1964) (right to counsel at interrogation); Massiah v. United States, 377 U.S. 201, 205 (1964) (right to counsel at meeting between defendant and accomplice); White v. Maryland, 373 U.S. 59, 60 (1963) (right to counsel at preliminary hearing); Hamilton v. Alabama, 368 U.S. 52, 54 (1961) (right to counsel at arraignment). *But see* Beard v. State, 369 So. 2d 769, 773 (Miss. 1979) (preliminary hearing not a critical stage, citing Allred v. State, 187 So. 2d 28, 32 (Miss. 1966)).

Moreover, the defendant is entitled to *effective* assistance of counsel. *See* Reece v. Georgia, 350 U.S. 85, 90 (1955) (effective assistance of counsel constitutional requirement of due process); Glasser v. United States, 315 U.S. 60, 76 (1942) (conflict of interest created by dual representation denied defendant his sixth amendment rights); Avery v. Alabama, 308 U.S. 444, 446 (1940) (constitutional guarantee of assistance of counsel not satisfied by mere formal appointments); Powell v. Alabama, 287 U.S. 45, 71 (1932) (failure of trial court to make effective appointment of counsel denial of due process).

A similar guarantee of right to counsel is found in the Mississippi Constitution: "In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, ..." Miss. Const. art. III, § 26.

han v. State.[14] *Callahan* raised the issue of the standard to be employed in evaluating ineffective assistance of counsel claims.[15] Because these claims have a basis in federal law,[16] the court was bound to adopt the federal standard as the minimum protection that must be afforded to claimants.[17] The problem, however, was that the United States Supreme Court had at the time never articulated a precise nationwide standard.[18]

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[14] 426 So. 2d 801 (Miss.), *cert. denied,* 103 S.Ct. 2118 (1983).

[15] 426 So. 2d at 804. The defendants applied for a rehearing from a denial of a petition to file a writ of error coram nobis. *Id.* at 802. Their petition alleged ineffective assistance of counsel. The court never reached this question, however, because the defendants failed to specifically allege the components of their claim. The defendants were granted leave to file a new application and affidavits showing more specific allegations of ineffective counsel. *Id.* at 805-06.

[16] Petitioners alleged violation of the fourteenth amendment due process clause, the thirteenth, fourteenth, and fifteenth amendments (alleging use of the criminal process to disenfranchise black voters), and the sixth and fourteenth amendments (alleging denial of effective assistance of counsel). *Id.* at 802-03.

[17] *See* Mobile Mechanical Contractors Ass'n v. Carlough, 456 F. Supp. 310, 330 (S.D. Ala. 1978) (in case which turned upon interpretation of Labor Management Relations Act, Alabama courts must interpret and apply federal law), *aff'd in part, rev'd in part,* 664 F.2d 481 (5th Cir. 1981); Machesky v. Bizzell, 288 F. Supp. 295, 300 (N.D. Miss. 1968) (state courts must allow vindication of denial of federal constitutional rights).

Of course, the state constitution can be a source of rights greater than those rights guaranteed by the United States Constitution. *See* Pruneyard Shopping Center v. Robbins, 447 U.S. 74, 81 (1980) (state provided greater right of free speech in shopping centers than did first amendment); *accord* McCrory v. State, 342 So. 2d 897, 900 (Miss. 1977) (state may place greater restrictions on its own power than does the federal constitution).

[18] In McMann v. Richardson, 397 U.S. 759, 770-71 (1970), the Court stated that an attorney's performance should be "within the range of competence demanded of attorneys in criminal cases." However, the Court left to the lower courts the task of formulating more specific constitutional guidelines. *Id.* at 771.

A number of different standards for evaluating ineffective assistance of counsel claims evolved among the federal circuits. *Compare* United States v. Nelson, 582 F.2d 1246, 1250 (10th Cir. 1978) (representation was of such a substandard level as to render the trial a mockery of justice and a sham), *cert. denied,* 439 U.S. 1079 (1979) *and* United States v. Bubar, 567 F.2d 192, 202 (2d Cir.) (representation must shock the conscience of the court), *cert. denied,* 434 U.S. 872 (1977) *with* Holscher v. Wood, 632 F.2d 710, 711-12 (8th Cir. 1980) (standard is whether counsel exercised customary skills and diligence that reasonably competent attorney would exercise under similar circumstances) *and* Isble v. United States, 611 F.2d 173, 175 (6th Cir. 1979) (defendant must be represented by counsel reasonably likely to render and rendering effective assistance).

The United States Supreme Court has since adopted a standard for ineffective assistance claims. *See* Strickland v. Washington, 104 S. Ct. 2052 (1984); *see also infra* note 39 and accompanying text.

The Mississippi Supreme Court has applied varying standards of review to ineffective assistance of counsel claims. In *Parham v. State*,[19] for example, the Mississippi court defined inadequacy of counsel as "representation so lacking in competence that it becomes apparent or should be apparent that it is the duty of the trial judge to correct it so as to prevent a mockery of justice."[20] Six years later, in *Rogers v. State*,[21] the court used the "farce and mockery" standard set forth by the District of Columbia Circuit in *Diggs v. Welch*,[22] which held that to justify relief on grounds of ineffective assistance, it must be shown that the proceedings shocked the judicial conscience and were a farce and mockery of justice.[23] In other cases the court has found that effective assistance was not denied when the defendant's trial was not "offensive to the common and fundamental ideas of fairness and right,"[24] and cited both the "farce and mockery" standard and the "reasonably likely to render and rendering effective assistance" standard.[25] Regardless of the particular language employed, "[the] conduct of counsel must have been exceptionally poor to have been classed as 'ineffective.' "[26] More often than not, ineffective assistance claims have been

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[19] 229 So. 2d 582 (Miss. 1969).

[20] *Id.* at 583. Noting that the defendant's counsel had filed motions, vigorously cross-examined witnesses, prepared instructions, and argued the case before the jury, the court in *Parham* found no merit in the defendant's contention that appointed counsel was inadequate. *Id.* at 583-84.

[21] 307 So. 2d 551 (Miss. 1975).

[22] 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

[23] 148 F.2d at 670. The court in *Diggs* stated that appointment of competent counsel *per se* satisfied the demands of the sixth amendment. The court reasoned that once a proper appointment of counsel was made, nothing short of a due process violation would establish an ineffective assistance of counsel claim. *Id.* at 668-69.

The "farce and mockery" standard was criticized in Cooper v. Fitzharris, 586 F.2d 1325, 1328 (9th Cir. 1978), *cert. denied*, 440 U.S. 974 (1979). The *Cooper* court rejected this standard, stating that the *Diggs* decision was based on the mistaken assumption that the right to effective assistance of counsel rested on the guarantees of the due process clause. Thus, under the "farce and mockery" standard, only a violation of due process would constitute ineffective assistance of counsel. 586 F.2d at 1328. The court concluded that Gideon v. Wainwright, 372 U.S. 335 (1963), established that the source of the right to effective counsel was the sixth amendment, made obligatory upon the states by the due process clause of the fourteenth amendment, and that the sixth amendment required proper appointment of counsel *and* effective representation. 586 F.2d at 1328-29; *see also* United States v. Bosch, 584 F.2d 1113, 1120-21 (1st Cir. 1978) (rejecting the "farce and mockery" standard in favor of "reasonably competent assistance" standard).

[24] Edwards v. State, 413 So. 2d 1007, 1013 (Miss. 1982).

[25] Berry v. State, 345 So. 2d 613, 615 (Miss. 1977).

[26] Williams & Bost, *The Assigned Counsel System: An Exercise of Servitude?*, 42 Miss. L.J. 32, 39 (1971).

treated summarily.[27]

In *Callahan*, the court adopted the "reasonably likely to render and rendering effective assistance" test that was originally formulated by the Court of Appeals for the Fifth Circuit in MacKenna v. Ellis.[28] The "reasonably likely to render and rendering effective assistance" test involves two lines of inquiry. The first question presented by the test is whether counsel was reasonably likely to render effective assistance. In this line of inquiry, the court examines the attorney's education and experience in criminal law.[29] The next step is to determine whether counsel in fact rendered reasonably effective assistance. At this juncture the court should examine counsel's conduct in the litigation, although the examination should not be limited to his conduct at

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[27] *See, e.g.*, Pasto v. State, 356 So. 2d 587, 589 (Miss. 1978); Cannon v. State, 190 So. 2d 848, 852 (Miss. 1966).

[28] 280 F.2d 592 (5th Cir. 1960), *modified*, 289 F.2d 928, *cert. denied*, 368 U.S. 877 (1961); *see* 426 So. 2d at 804. The Fifth Circuit described the new constitutional standard for judging the effectiveness of counsel as follows:

> We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance. We consider undivided loyalty of appointed counsel to client as essential to due process.

280 F.2d at 599 (emphasis in original).

[29] 426 So. 2d at 804-05. In *MacKenna v. Ellis*, the court considered counsel's inexperience in addition to other factors in finding that the defendant had been denied effective assistance of counsel. *See* 280 F.2d at 599-601; *see also* Washington v. Watkins, 655 F.2d 1346, 1357 (5th Cir. 1981) (court recognized education, experience, and expertise as critical elements); Berry v. State, 345 So. 2d 613, 614-16 (Miss. 1977) (counsel who had been practicing five months and had never tried a criminal case not ineffective). However, inexperienced counsel is not ineffective as a matter of law. Bell v. Watkins, 692 F.2d 999, 1008 (5th Cir. 1982).

In addition to education and experience, the question whether counsel was likely to render effective aid will often depend on counsel's ability to give "undivided loyalty" to his client. In Irving v. State, 361 So. 2d 1360, 1365 (Miss. 1978), the Mississippi Supreme Court held that the fact that two codefendants were represented by the same attorney was not grounds for a reversal absent a conflict of interest which interfered with the defense.

Personal tensions or conflicts which develop during litigation are generally not grounds for relief on an ineffective assistance of counsel claim. *See* Edwards v. State, 413 So. 2d 1007, 1013 (Miss. 1982) (counsel received two reprimands from the bench); Evans v. State, 273 So. 2d 495, 497 (Miss. 1973) (defendant believed his counsel and the district attorney were in a conspiracy to convict him); Belina v. State, 228 Miss. 330, 335-36, 87 So. 2d 919, 922 (1956) (disagreement between main counsel and co-counsel). *But see* Edge v. State, 393 So. 2d 1337, 1342 (Miss. 1981) (defendant denied effective assistance because counsel was fatigued).

trial.[30] The burden of proof is on the defendant to show ineffective assistance.[31] Effective counsel does not mean errorless counsel, and mere mistakes by his attorney will not entitle the defendant to relief.[32] In addition to ineffective assistance, the defendant must demonstrate that he was prejudiced by his counsel's errors or omissions.[33] If the defendant demonstrates that he suffered actual prejudice, then "the state may show in the context of all the evidence that it remains certain beyond a reasonable doubt that the outcome of the proceedings would not have been altered but for the ineffectiveness of counsel."[34]

A recent decision of the United States District Court for the Northern District of Mississippi demonstrates the operation of the reasonably likely to render and rendering effective assistance test. In *Voyles v. Watkins*,[35] the court reviewed an ineffective assistance of

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[30] 426 So. 2d at 805. "[T]he methodology for applying the standard involves an inquiry into the actual performance of counsel conducting the defense and a determination of whether reasonably effective assistance was rendered based upon the *totality* of the circumstances . . . ." Washington v. Estelle, 648 F.2d 276, 279 (5th Cir. 1981) (emphasis in original); *see also* Washington v. Watkins, 655 F.2d 1346, 1355 (5th Cir. 1981) (reasonably effective assistance cannot be determined solely by performance at trial); Read v. State, 430 So. 2d 832, 839 (Miss. 1983) (court examined totality of counsel's performance).

[31] 426 So.2d at 805; *see also* Sullivan v. Cook, 218 So. 2d 879, 881 (Miss. 1969) (burden on petitioner to prove incompetent and ineffective representation by counsel).

[32] Washington v. Watkins, 655 F.2d 1346, 1355 (5th Cir. 1981).

[33] 426 So. 2d at 805. Although the denial of effective assistance of counsel is far more likely to result in harmful error "than almost any other denial of a right at trial that can be imagined," Read v. State, 430 So. 2d 832, 840 (Miss. 1983), the defendant now must demonstrate that the ineffective assistance created not only a possibility of prejudice, but that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 104 S. Ct. 2052, 2068 (1984). *See supra* note 39 and accompanying text.

The Mississippi Supreme Court also has demanded a showing of prejudice by defendants claiming ineffective assistance of counsel. *See* Irving v. State, 361 So. 2d 1360, 1365 (Miss. 1978) (record revealed no prejudice or harm); Estes v. State, 326 So. 2d 786, 790 (Miss. 1976) (prejudice resulting from belated appointment of counsel did not appear from totality of circumstances). Judge Bazelon, Chief Judge for the United States Court of Appeals for the District of Columbia, has suggested that the requirement that the defendant demonstrate prejudice is an anachronism dating back to early United States Supreme Court and appellate court decisions which read due process requirements into the sixth amendment. Judge Bazelon concluded: "In [Gideon v. Wainwright, 372 U.S. 335 (1963)] . . . the Court abandoned due process language and the requirement for a showing of prejudice in right to counsel cases." Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L.R., 1, 29 (1973).

[34] 426 So. 2d at 805 (quoting Washington v. Strickland, 693 F.2d 1243, 1262 (5th Cir. 1982), *rev'd*, 104 S. Ct. 2052 (1984)).

[35] 489 F. Supp. 901, 904 (N.D. Miss. 1980).

counsel claim in a petition for federal habeas corpus relief. The court acknowledged that the defendant's trial attorneys had adequate training and experience.[36] At trial, however, counsel had failed to present witnesses in the defendant's behalf, to cross-examine the prosecution's chief witness adequately, or to present any evidence during the sentencing phase.[37] Moreover, although the prosecution's chief witness was an accomplice to the crime for which the defendant was being tried, counsel failed to request an instruction to the effect that the testimony of an accomplice should be viewed with suspicion. The court found that these shortcomings in the defendant's representation had denied him his right to effective assistance of counsel.[38]

While *Callahan* appeared to signal the adoption of the "reasonably likely to render and rendering effective assistance" test as the one to be consistently used in Mississippi courts, a 1984 United States Supreme Court decision casts some doubt on the viability of that test in sixth amendment claims. An ineffective assistance claim requires a showing that counsel's performance was deficient and that there is "a reasonable probability" that the outcome would have been different absent counsel's errors, the Supreme Court held in *Strickland v. Washington.*[39] The effect of this new standard on the *Callahan* approach remains to be seen at this writing.

In *Read v. State,*[40] the Mississippi Supreme Court held that an ineffective assistance of counsel claim is not procedurally barred by a failure to preserve the issue at trial.[41] Typically, the supreme court will

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[36] *Id.* at 910. Defendant's counsel, a graduate of the University of Mississippi Law School, had been practicing law five years at the time of the defendant's trial, although this was the first murder case he had tried. *Id.* at 907.

[37] *Id.* 907-09.

[38] *Id.* at 911-12.

[39] 104 S. Ct. 2052, 2064, 2068 (1984). *Strickland* was decided in late spring as this issue of the MISSISSIPPI LAW JOURNAL was in press. Full analysis of *Strickland* is beyond the scope of this review of the Mississippi Supreme Court's 1983 decisions.

[40] 430 So. 2d 832 (Miss. 1983).

[41] *Id.* at 837. The court also prescribed procedural rules for the handling of ineffective assistance of counsel claims. First, if the ineffective assistance of counsel claim is raised on direct appeal, the court should review the entire record. If the court can determine from the review that the defendant was denied effective assistance of counsel, then the court should reverse and remand for a new trial. Second, if the court is unable to determine from the record that defendant's counsel was ineffective, the court should proceed to decide the merits of the case. If the court reverses the defendant's conviction on other grounds, the ineffective assistance of counsel claim would become moot. In the event of an affirmance, the court may, nevertheless, reach the merits of an ineffective assistance of counsel claim if the parties stipulate that the record is adequate and the court determines that findings of fact by a trial judge are not needed. Alternatively, if

not consider an error on appeal unless it was objected to and preserved at trial.[42] The court has, however, recognized an exception to this practice in many cases where the fundamental rights of the defendant are at stake.[43] Recognizing the right to effective counsel as guaranteed by both the United States Constitution[44] and the Mississippi Constitution,[45] the court in *Read* unequivocally held that the procedural bar rule has no application to the issue of ineffective assistance of counsel.[46]

The court's decision incorporates both practical and jurisprudential considerations. Under the court's procedural bar rule, an issue not timely presented at trial or raised on appeal is deemed to be waived.[47] Nevertheless, a constitutional right—such as the right to effective as-

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the court affirms on other grounds, it should do so without prejudice to defendant's right to raise the ineffective assistance of counsel issue in post-conviction proceedings.

After affirmance, the defendant may file an appropriate post-conviction proceeding, raising the ineffective assistance of counsel issue. If the defendant's petition states a prima facie claim, "he will then be entitled to an evidentiary hearing on the merits of that issue in the Circuit Court of the county wherein he was originally convicted." The defendant would have the right to appeal to the Mississippi Supreme Court from this proceeding. *Id.* at 841-42.

[42] Miss. Sup. Ct. R. 6(b) provides: "No error not distinctly assigned shall be argued by counsel except upon request of the Court, but the Court may, at its option, notice a plain error not assigned or distinctly specified." *See also* Miss. Sup. Ct. R. 42 (how errors in jury instructions are to be reviewed).

Before an issue can be assigned as error on appeal, it must have been presented to the trial court. Williamson v. State, 330 So. 2d 272, 274 (Miss. 1976); *e.g.*, Colburn v. State, 431 So. 2d 1111, 1114 (Miss. 1983) (failure to object to jury instruction barred review); Howell v . State, 354 So. 2d 1124, 1127 (Miss. 1978) (proposition not raised at trial not properly before court).

[43] *See* Wheat v. State, 420 So. 2d 229, 239 (Miss. 1982) (instruction question considered though no formal objection raised); Culberson v. State, 379 So. 2d 499, 506 (Miss. 1980) (same); Bell v. State, 360 So. 2d 1206, 1215 (Miss. 1978) (instruction considered though not urged on appeal); Smith v. State, 240 Miss. 738, 749, 128 So. 2d 857, 862 (1961) (Rogers J., separate opinion) (court addressed illegal search issue although point not raised at trial); Musselwhite v. State, 212 Miss. 526, 539, 54 So. 2d 911, 914-15 (1951) (evidentiary issue reached even though trial court not afforded opportunity to pass on objection); Brooks v. State, 209 Miss. 150, 155, 46 So. 2d 94, 97 (1950) (constitutional right to counsel rises above mere rules of procedure); Carter v. State, 198 Miss. 523, 528, 21 So. 2d 404, 404 (1945) (errors affecting fundamental rights are exceptions to general rule that errors cannot be raised for first time on appeal).

[44] U.S. Const. amends. VI, XIV; *see* Gideon v. Wainwright, 372 U.S. 335, 342-44 (1963) (applying sixth amendment guarantees to states).

[45] Miss. Const. art. III, § 26; *see* Stewart v. State, 229 So. 2d 53, 55 (Miss. 1969) (effective assistance guaranteed by state constitution).

[46] 430 So. 2d at 837.

[47] *Id.* at 838; *see supra* note 42 and accompanying text.

sistance of counsel—cannot be waived without a realistic opportunity to assert it.[48] The defendant in *Read* could not be expected to raise the question of his counsel's incompetence at trial, nor could the defendant's attorney be expected to raise and conscientiously litigate questions of his own incompetence. Thus, the court concluded, as a practical matter the defendant had no meaningful opportunity to assert his right to effective assistance of counsel until well after the jury had returned its verdict—too late under normal procedure to preserve the error for appeal.[49]

The court also found application of the procedural bar rule to ineffective assistance of counsel claims offensive to principles of judicial logic. The court's reasoning rested on the relationship between rights and interests. Rights are entitlements which an individual may assert "no matter how inconvenient society or its members may deem it."[50] An individual's rights are curtailed only when they conflict with the rights of others. When rights are forced to yield to mere interests, they

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[48] 430 So. 2d at 838. The United States Supreme Court has stated that waivers of constitutional rights must be voluntary, knowing, and intelligent acts "done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748 (1970); *accord* Faretta v. California, 422 U.S. 806, 832-36 (1975) (defendant may defend *pro se* if right to counsel is voluntarily and intelligently waived); *see also* Johnson v. Zerbst, 304 U.S. 438, 464 (1938) (waiver is intentional relinquishment or abandonment of a known right or privilege). The Mississippi Supreme Court has indicated that the "intentional relinquishment of a known right or privilege" standard of waiver is to be applied to rights secured by the Mississippi Constitution. Morgan v. United States Fidelity & Guar. Co., 222 So. 2d 820, 829-30 (Miss. 1969).

But the United States Supreme Court has also held that where a defendant failed to raise a constitutional objection at trial, he waived that objection and could not assert it on appeal. *See* Davis v. United States, 411 U.S. 233, 236-37 (1973) (FED. R. CRIM. P. 12(b)(2) applies to both constitutional and procedural defects). The Mississippi Supreme Court has also taken this position. The defendant in Robinson v. State, 345 So. 2d 1044, 1045 (1977), urged on appeal that the record had to affirmatively reflect that he had knowingly and voluntarily waived his constitutional right to trial by jury. In rejecting the defendant's argument the court stated:

> Our courts are always ready to protect and vindicate the constitutional rights of the accused, but they require the defendant's active cooperation. In this case, the defendant made no objection to his counsel's waiver of trial by jury at the outset of the trial, nor did he raise the issue by a motion for a new trial. Either procedure would have allowed the trial court to hear evidence and to give full consideration to his claim.

345 So. 2d at 1046.

[49] 430 So. 2d at 838-39. Much of counsel's ineffectiveness could occur prior to trial when defendant is absent. This, the court noted, only compounds the futility of trying to apply the contemporaneous objection rule to ineffective assistance of counsel claims. *Id.* at 839.

[50] *Id.* at 840.

cease to be rights. The court reasoned that the right to effective assistance of counsel could not be compromised by the state's interest in judicial efficiency, which is served by the procedural bar rule.[51]

The *Read* decision is laudable in that it assures the defendant of an opportunity to exercise his constitutional right to effective counsel. Although state courts have the initial responsibility for vindicating constitutional rights in criminal trials,[52] a defendant may obtain federal habeas corpus review upon a showing that he is being held "in custody in violation of the constitution or laws or treaties of the United States."[53] In *Wainwright v. Sykes*,[54] the United States Supreme Court ruled that when a procedural default bars state litigation of a constitutional claim, a defendant may not obtain federal habeas relief absent a showing of cause for noncompliance with the procedural requirement and some showing of prejudice resulting from the alleged constitutional violation.[55] Thus, by removing the procedural bar from the ineffective assistance of counsel claim, the Mississippi Supreme Court has not only guaranteed state review of the defendant's claim, but has allowed federal review as well.

The *Read* decision was based in part on the priority of legal rights over state interests. Undoubtedly, there are other *rights* just as fundamental as the right to counsel which should prevail over the state's *interest* served by the procedural bar rule. It remains to be seen whether the court will extend the logic of *Read* to protect constitu-

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[51] *Id.* at 841. The court further reasoned that another state interest—that of ensuring defendants a realistic opportunity to vindicate their constitutional rights at the trial level—served to counterbalance the state's interest in efficiency. *Id.*

[52] Engle v. Isaac, 456 U.S. 107, 128 (1982).

[53] *Id.* at 119. Federal habeas corpus review is provided to state prisoners by 28 U.S.C. § 2254 (1976), which provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(A).

A similar guarantee is provided to federal prisoners by 28 U.S.C. § 2255 (1976). *E.g.*, Davis v. United States, 411 U.S. 233, 233 (1973) (federal prisoner filed § 2255 post-conviction motion alleging unconstitutional discrimination in selection of grand jury).

[54] 433 U.S. 72 (1977).

[55] *Id.* at 85; *see, e.g.*, Engle v. Issac, 456 U.S. 107, 134 (1982) (failure to object to jury instructions at state trial barred federal review); Davis v. Maggio, 706 F.2d 568, 570 (5th Cir. 1983) (issue precluded from appellate review by state law also precluded from federal review); Bass v. Estelle, 696 F.2d 1154, 1157 (5th Cir. 1983) (failure to object to excusal of venireman barred federal review of issue).

tional claims from preclusion by the state interests served by the procedural bar rule.

II. Reckless Driving as Aggravated Assault

In *Gray v. State*,[56] the Mississippi Supreme Court held for the first time that reckless driving which results in personal injury may constitute aggravated assault under section 97-3-7(2)(a) of the Mississippi Code.[57] Previously, for a first offense under the reckless driving statute,[58] a driver could be penalized by more than a fine only if death resulted.[59] The significance of *Gray* is that a defendant who hereafter causes personal injury by his reckless driving may possibly be impris-

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[56] 427 So. 2d 1363 (Miss. 1983).

[57] *Id.* at 1365, 1368. Mississippi's aggravated assault statute provides in part:

> A person is guilty of aggravated assault if he (a) attempts to cause serious bodily injury to another, or cause such injury purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm . . . .

Miss. Code Ann. § 97-3-7 (Supp. 1983).

Although *Gray* was the first Mississippi case to decide the issue whether a reckless driver could be found guilty of aggravated assault, the Mississippi Supreme Court had been presented with the same issue in *McGee v. State*, 365 So. 2d 302 (Miss. 1978). An instruction had informed the jury that if they found that the defendant had intentionally or recklessly struck the victim with his automobile, manifesting an extreme indifference to human life, then it was their duty to find him guilty of aggravated assault. Rather than resting its decision upon statutory construction, the Mississippi Supreme Court found that the evidence did not support such an instruction. *Id.* at 304.

Since the *Gray* decision, the court has continued to construe the aggravated assault statute to include reckless driving. *See, e.g.*, Buchanan v. State, 427 So.2d 697, 699 (Miss. 1983).

[58] Mississippi's reckless driving statute provides:

> Any person who drives any vehicle in such a manner as to indicate either a wilful or a wanton disregard for the safety of persons or property is guilty of reckless driving.
>
> Every person convicted of reckless driving shall be punished upon a first conviction by a fine of not less than $5.00 nor more than $100.00, and on a second or subsequent conviction he may be punished by imprisonment for not more than ten days or by a fine not exceeding $500.00, or by both.

Miss. Code Ann. § 63-3-1201 (1972).

[59] Even before the *Gray* decision, if death resulted from reckless driving, the defendant could be prosecuted for manslaughter by culpable negligence under § 97-3-47 of the Mississippi Code. *See, e.g.*, Atkinson v. State, 392 So. 2d 205, 206 (Miss. 1980) (manslaughter conviction for reckless driving); Patrick v. State, 249 So. 2d 667, 668-69 (Miss. 1971) (same), *cert. denied*, 404 U.S. 1038 (1972).

oned rather than merely fined.[60] Any attempt to apply the aggravated assault statute broadly to automobile accidents is limited, however, by two considerations: (1) the degree of misconduct, short of actual criminal intent, necessary to trigger the aggravated assault statute; and (2) the extent to which reckless driving constitutes such misconduct.

The *Gray* court found that actual criminal intent to cause personal injury is not a required element of proof for aggravated assault with an automobile.[61] This is consistent with prior decisions concerning aggravated assault, which have held that a showing of culpable negligence is sufficient to trigger the statute.[62] Culpable negligence was defined in *Smith v. State*[63] as "the conscious and wanton or reckless disregard of the probabilities of fatal consequences to others as a result of the willful creation of an unreasonable risk thereof."[64] A showing of this extreme degree of negligence is sufficient to warrant an imputation of intent, and hence trigger the statute.[65]

The court also stated, again in keeping with prior decisions, that intoxication alone does not constitute culpable negligence per se, but that "[t]he intoxication must be a proximate contributing cause to the collision."[66] Nonetheless, it appears that intoxication is a factor the court considers extremely significant, since in examining several cases from other jurisdictions construing assault statutes to include vehicular

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[60] *See* 427 So. 2d at 1365 (penalty for aggravated assault is imprisonment of up to twenty years under MISS. CODE ANN. § 97-3-7(2) (Supp. 1983)).

[61] 427 So. 2d at 1366 (citing Lamb v. State, 70 Okla. Crim. 236, 237, 105 P.2d 799, 800 (1940)).

[62] *See, e.g.*, Nelson v. State, 361 So. 2d 343, 344 (Miss. 1978) (defendant pointed supposedly unloaded pistol at victim, the pistol then discharged); Woodward v. State, 164 Miss. 468, 469, 144 So. 895, 896 (1933) (driver struck victim with truck).

[63] 197 Miss. 802, 20 So. 2d 701 (1945).

[64] *Id.* at 817, 20 So. 2d at 705. The culpable negligence standard in Mississippi has been developed primarily through manslaughter cases such as *Smith*. In Nelson v. State, 361 So. 2d 343, 344 (Miss. 1981), the supreme court found the wording of the aggravated assault statute to be analogous to the culpable negligence standard set forth in these cases. *Compare* MISS. CODE ANN. § 97-3-7(2) (Supp. 1983) ("[causing injury] recklessly under circumstances manifesting extreme indifference to the value of human life") *with* Smith v. State, 197 Miss. at 817, 20 So. 2d at 705 (quoted in text).

[65] Woodward v. State, 164 Miss. 468, 474-75, 144 So. 895, 896 (1933).

[66] 427 So. 2d at 1370; *see* Roberts v. State, 379 So. 2d 514, 517 (Miss. 1979); Gandy v. State, 373 So. 2d 1042, 1046 (Miss. 1974); Cutshall v. State, 191 Miss. 764, 771, 4 So. 2d 289, 291 (1941). This conclusion follows from the proposition that a person may violate a traffic law, such as that against driving while intoxicated, and still not act in a fashion so reckless as to constitute culpable negligence. *See* Roberts v. State, 379 So. 2d at 517. By the same token, it is of course quite possible for a person to act in a culpably negligent fashion without violating a traffic law at all.

offenses the court was at some pains to note the role of alcohol in each case.[67] It is quite possible that the court was sending a message to drunken drivers in *Gray*. That apparently was the opinion of Justice Walker, who in dissent expressed the fear that merely reckless drivers would be charged and possibly convicted as felons under the majority's decision, with undeservedly serious consequences.[68] He then stated "I am *strongly* in favor of stiff penalties and sanctions for driving while intoxicated . . . [however] a person could be charged with aggravated assault under section 97-3-7(2) who has never taken a drink of intoxicants in his life."[69]

It does not appear, however, that previous cases applying the culpable negligence standard to operation of an automobile have penalized the merely reckless driver. For example, in *Gant v. State*,[70] the defendant displayed rather extreme recklessness, weaving from side to side of the road, preventing other cars from passing him and eventually swerving into the opposite lane and colliding with a truck.[71] This behavior was held not to reach the level of wantonness necessary for a finding of culpable negligence.[72]

Indeed, as the majority recognized in *Gray*, and as Justice Dan Lee's dissent emphasized, even in the case of the intoxicated driver a finding of culpable negligence is not at all assured.[73] The standard set

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[67] *See* 427 So. 2d at 1365-66; Harmon v. State, 260 Ark. 665, 667-69, 543 S.W.2d 43, 44-45 (1976) (witness smelled alcohol on defendant, policeman testified defendant was in stupor); Lott v. State, 92 Okla. Crim. 324, 329, 223 P.2d 147, 151 (1950) (evidence was conclusive that defendant was drunk at the time of the accident); Blott v. State, 588 S.W.2d 588, 591-92 (Tex. Crim. App. 1979) (witnesses smelled strong odor of alcohol about defendant's person).

[68] 427 So. 2d at 1370-71 (Walker, J., dissenting). Justice Walker argued that the aggravated assault statute was not intended to apply to automobile offenses, and that, in essence, it was intended only to apply to persons having committed an act with actual criminal intent. *Id.*

[69] *Id.* at 1371 (emphasis in original).

[70] 244 So. 2d 18 (Miss. 1971).

[71] *Id.* at 20. It is also noted that at the hospital following the accident the defendant "hollered at the nurses who were attempting to help him." *Id.*

[72] *Id.* at 21; *see also* Frazier v. State, 289 So. 2d 690, 692 (Miss. 1974) (driving without a license and driving with a heavily intoxicated passenger who caused accident do not constitute culpable negligence). Compare to these cases Woodward v. State, 164 Miss. 468, 474-75, 144 So. 895, 896 (1933), in which the defendant was found culpably negligent. In that case the defendant struck the victim with his vehicle while turning around, in spite of the fact that he knew the victim to be there and there was ample room to turn in the other direction. *Id.* at 474, 144 So. at 896.

[73] *See* 427 So. 2d at 1371-72 (Lee, J., dissenting); *see supra* note 66 and accompanying text. Justice Lee argued that the trial court erred in not granting the defendant an instruction which made it clear that driving while intoxicated is not *per se* culpable neg-

forth in *Gant v. State* is that "[t]he state must show that the drinking of intoxicants was to such an extent so as to prevent the defendant from operating his automobile upon the highway in [sic] reasonably safe and careful manner and that the intoxication was the proximate cause of death."[74] Thus, it does not seem likely that the *Gray* decision will result in the wholesale prosecution of merely negligent drivers.

III. Suggested Revision of the Self-defense Instruction

In *Robinson v. State*,[75] the Mississippi Supreme Court expressed dissatisfaction with the self-defense instruction currently used in murder cases because it might be misleading to the jury.[76] The court declined, however, to find use of the instruction to be reversible error.[77]

The jury instruction, although previously criticized,[78] has had a long history of use in Mississippi.[79] A majority of justices found the

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ligence. 427 So. 2d at 1371-72. The instructions given in essence informed the jury that if it found driving across the yellow line while intoxicated on a rainy night a manifestation of extreme indifference to human life, the defendant was guilty of aggravated assault. *Id.* at 1369.

[74] 244 So. 2d at 20. Cutshall v. State, 191 Miss. 764, 772, 4 So. 2d 289, 292 (1941), set forth another, rather murky, standard: "For [intoxication] to be a factor in a case involving culpable negligence it must create an abnormal physical and mental condition which tends to deprive one of the clearness of intellect and control of himself which he would otherwise possess."

[75] 434 So. 2d 206 (Miss. 1983).

[76] *Id.* at 207. The self-defense instruction used in this case and commonly used as a model by prosecutors is as follows:

> The Court instructs the jury that to make a killing justifiable on the grounds of self-defense, the danger to the defendant must either be actual, present and urgent, or the defendant must have reasonable grounds to apprehend a design on the part of the victim to do bodily harm, and in addition to this, that there must be imminent danger of such design being accomplished; and hence, mere fear, apprehension or belief, however sincerely entertained by one person, that another designs to take his life or to do him some bodily harm, will not justify the former in killing the latter. A party may have apprehension that his life is in danger, and believe the grounds of his apprehension just and reasonable, and yet he acts at his peril. He is not the final judge; the jury may determine the reasonableness of the ground upon which he acted.

Id.

The defense counsel objected to this instruction on the ground that it was a misstatement of the law, not that it was misleading. *Id.*

[77] *Id.; see infra* text accompanying note 81.

[78] *See, e.g.*, Bailey v. State, 174 Miss. 453, 454, 165 So. 122, 122 (1936) (this instruction standing alone could possibly mislead the jury); Hill v. State, 94 Miss. 391, 392, 49 So. 145, 145-46 (1909) (instruction too indefinite).

[79] The present instruction has been recognized for well over a century. *See* Wesley

instruction to be a correct statement of the law, though some considered it too long, redundant and confusing.[80] A special concurring opinion explained that the court failed to find the instruction reversible error because it has been relied upon for years, and a reversal on this ground would result in disruption and inequities.[81]

The majority opinion and one special concurring opinion each suggested an alternative. Seven justices preferred, and urged the adoption of, the majority's suggested alternative to the self-defense instruction now commonly used.[82] There was no support for the alternative suggested by Justice Hawkins.[83]

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v. State, 37 Miss. 327, 349 (1859).

[80] *See* 434 So. 2d at 208 (Hawkins, J., specially concurring). In a special concurring opinion, Justices Patterson and Dan Lee found the specific problem with the present instruction to be that it contains three grounds, the presence of which "substantially erodes if not totally obliterates the concept of self-defense." *Id.* at 210. The three "eroding" qualities "fraught with redundancy" are:

> (1) [M]ere fear, apprehension or *belief;*
>
> *(2) [H]owever sincerely entertained* by one person, that another designs to take his life or to do him some bodily harm, will not justify the former in killing the latter;
>
> (3) A party may have apprehension that his life is in danger, and believe the grounds of his apprehension just and reasonable and yet he *acts at his peril.*

Id. (Patterson and Dan Lee, JJ., specially concurring) (emphasis in original).

[81] *Id.* (Patterson and Dan Lee, JJ., specially concurring).

[82] *Id.* at 206-11. The instruction suggested by the majority is as follows:

> The Court instructs the jury that to make a killing justifiable on the grounds of self-defense, the danger to the defendant must be either actual, present and urgent, or the defendant must have reasonable grounds to apprehend a design on the part of the victim to kill him or to do him some great bodily harm, and in addition to this he must have reasonable grounds to apprehend that there is imminent danger of such design being accomplished. It is for the jury to determine the reasonableness of the ground upon which the defendant acts.

Id. at 207.

In a scathing dissent, Justice Bowling observed that since prosecutors ignored the suggested revision of the instruction in Bailey v. State, 174 Miss. 453, 454, 165 So. 122, 122 (1936), and since these opinions are not widely read, it is unlikely the majority's suggestion will be heeded. 434 So. 2d at 211-12 (Bowling, J., dissenting).

[83] Justice Hawkins found the majority's suggested alternative to be as confusing as the one commonly used. 434 So. 2d at 208 (Hawkins, J., specially concurring). His suggested alternative, unsupported by any other justice, is as follows:

> The Court instructs the jury that to make a killing justifiable on the grounds of self-defense, the defendant must either actually be in present danger of death or serious bodily harm at the hands of the victim, or must have a reasonable grounds to presently fear death or serious bodily harm at the hands of the victim, and mere belief of death or serious bodily harm at the hands of the victim, however sincerely entertained is insufficient. It will be for the jury to determine whether the defendant was in actual present danger for his life, or

The court's explicit dissatisfaction with, and suggested alternative instruction to, the currently used self-defense instruction should lead judges and prosecuting attorneys in Mississippi to reexamine the present self-defense instruction in light of *Robinson*. In an effort to aid the jury in its understanding of the concept of self-defense, it would be prudent for prosecutors to substitute the majority's suggested instruction for the one currently used.

IV. Double Jeopardy

The double jeopardy clause of the fifth amendment to the United States Constitution provided the basis for the holdings in *Sanders v. State*[84] and *Smith v. State*.[85] The different fact situations in the two cases necessitated two distinct double jeopardy clause analyses. *Sanders* and *Smith* are factually similar except for one crucial point. In each case the defendant was first tried for rape and then, in a subsequent trial, convicted of burglary arising out of the same series of events.[86] In *Smith*, however, the defendant was acquitted in the rape trial, whereas the defendant in *Sanders* was found guilty in his rape trial.[87] Both defendants appealed their burglary convictions on the ground that the second trial constituted double jeopardy.[88]

A proper double jeopardy analysis begins with the United States Supreme Court decision in *Blockburger v. United States*.[89] According to *Blockburger*, the defendant has not been subjected to double jeopardy if each charge requires proof of an additional element.[90] The Mis-

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had reasonable grounds to fear death or serious bodily harm at the hands of the victim.

Id.

[84] 429 So. 2d 245 (Miss. 1983).

[85] 429 So. 2d 252 (Miss. 1983).

[86] *Sanders*, 429 So. 2d at 246-47; *Smith*, 429 So. 2d at 253.

[87] *See Sanders*, 429 So.2d at 246; *Smith*, 429 So. 2d at 253. In a special concurring opinion in *Smith*, Justice Robertson found this to be the "outcome determinative distinction" between the double jeopardy analysis in *Sanders* and *Smith*. *Id.* at 258 (Robertson, J., specially concurring).

[88] *See* Sanders v. State, 429 So. 2d at 246; Smith v. State, 429 So. 2d at 253.

[89] 284 U.S. 299 (1932). The *Blockburger* "same offense" analysis applies to the double jeopardy clause of the fifth amendment to the United States Constitution and apparently to the double jeopardy clause of article 3, section 22 of the Mississippi Constitution. *See* Hughes v. State, 401 So. 2d 1100, 1105 (Miss. 1981) (Mississippi double jeopardy clause extends to repeated prosecutions for the same offense).

[90] 284 U.S. at 304. The *Blockburger* rule focuses on whether a defendant convicted of two or more crimes will be subject to multiple punishment for substantially the same offense. United States v. Cowart, 595 F.2d 1023, 1029-30 (5th Cir. 1979). A defendant

sissippi Supreme Court concluded that the defendant in *Smith v. State* had not suffered double jeopardy under the *Blockburger* analysis since the rape and burglary counts each required proof of different elements.[91]

A more complicated double jeopardy analysis is required, however, when the defendant is acquitted of the first charge, as in *Sanders v. State*. Although not viewed as subject to double jeopardy under the *Blockburger* rule, an acquitted defendant may nevertheless be subject to double jeopardy under the "collateral estoppel" theory enunciated by the United States Supreme Court in *Ashe v. Swenson*.[92] Mississippi courts have historically followed *Ashe* in construing the United States Constitution.[93] Although the *Sanders* court was critical of the *Ashe* decision, since the Mississippi Constitution contains a double jeopardy clause parallel to that in the United States Constitution, "in the inter-

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cannot, of course, subsequently be tried for the same offense after being acquitted in the first prosecution. Serfass v. United States, 420 U.S. 377, 388 (1975).

[91] *Smith*, 429 So. 2d at 257. *Compare* MISS. CODE ANN. § 97-3-65(2) (Supp. 1983) (Mississippi's rape statute) *with* MISS. CODE ANN. § 97-17-23 (1972) (Mississippi's burglary statute).

[92] 397 U.S. 436 (1970). *Ashe* involved the alleged armed robbery of six poker players. The defendant was tried for robbery of one of the players but was acquitted due to lack of identification by the victims. *Id.* at 437-39. In a subsequent trial, the defendant was found guilty of robbery of another of the poker players. The Court held that the federal rule of collateral estoppel was embodied by the double jeopardy clause of the fifth amendment. *Id.* at 440; *see also* Brown v. Ohio, 432 U.S. 161, 164-66 (1977) (collateral estoppel part of fifth amendment double jeopardy clause). The *Ashe* rationale applies only when the alleged offenses arise from a "common nucleus of operative facts." *Sanders*, 429 So. 2d at 250; *see Ashe*, 397 U.S. at 443-47 (same circumstances inferentially necessary).

In general, collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." 397 U.S. at 443. This doctrine is modified, however, when used in criminal cases. When there was a general verdict of acquittal in a previous trial, the court must take a "totality of the circumstances" view in determining if a jury "could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.* at 444; *accord* Sanders v. State, 429 So. 2d at 251.

Since the jury in the first trial in *Ashe* found that the defendant was not one of the thieves, a subsequent trial alleging that he was violated the double jeopardy clause. 397 U.S. at 446-47.

[93] *See, e.g.*, Otis v. State, 418 So. 2d 65, 67 (Miss. 1982) (collateral estoppel not applied when acts committed at different times); Hughes v. State, 401 So. 2d 1100, 1105 (Miss. 1981) (collateral estoppel not applicable when first trial ended in conviction); State v. Clements, 383 So. 2d 818, 819-20 (Miss. 1980) (collateral estoppel barred subsequent prosecution); *accord* State v. Smith, 278 So. 2d 411, 414-15 (Miss. 1973) (first recognized collateral estoppel doctrine).

est of establishing a common construction for linguistically similar provisions in the two constitutions" the court made the *Ashe* doctrine applicable to the Mississippi provision.[94]

The critical issue in the *Ashe v. Swenson* double jeopardy analysis is whether it is logical to conclude from the jury's verdict in the first trial that the defendant is also exonerated from the charge in the second trial.[95] By scrutinizing the issues presented at the first trial, the court on appeal is to view the finding of fact by the jury "with realism and rationality."[96] If it is found that the charge thereafter facing the defendant cannot factually coexist with a previous finding of not guilty, then it is incumbent on the court to find that the defendant has been subjected to double jeopardy.[97] In *Sanders*, it was found that the defendant was acquitted in the rape trial solely on the grounds that another person committed the act.[98] Since an acquittal in the first trial of the rape charge cannot "logically coexist" with a later burglary indictment arising from the same series of events, then a subsequent trial for burglary placed the defendant in *Sanders* in double jeopardy.[99]

An important potential problem which the *Sanders* decision suggests but does not address is whether the prosecution may use collateral estoppel against a defendant. Some circuit courts of appeal have approved the use of such a procedure. In *Hernandez-Uribe v. United States*,[100] the defendant was estopped from denying the fact that he had not been born in the United States because he had pled guilty in a prior trial to a charge of being an illegal alien. Therefore, a jury instruction used in a subsequent trial that advised the jury of this finding of alienage in the previous trial was correct.[101] Use of collateral es-

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[94] *See* 429 So. 2d at 251-52.

[95] *Ashe*, 397 U.S. at 446.

[96] *Sanders*, 429 So. 2d at 248 (citing *Ashe*, 397 U.S. at 444).

[97] *Sanders*, 429 So. 2d at 248 (citing *Ashe*, 397 U.S. at 444). Of course, if the defendant was found guilty in the first trial, he is armed with no finding of fact in his favor, and the collateral estoppel line of double jeopardy cases does not apply. *See* Hughes v. State, 401 So. 2d 1100, 1105 (Miss. 1981). In *Hughes*, the defendant was charged with rape and kidnapping arising out of the same events. Since he was found guilty of rape in the first trial, there was no finding of fact in his favor in the subsequent kidnapping trial. Consequently, the trial for kidnapping did not constitute double jeopardy. *Id.* at 1101-05.

[98] *Sanders*, 429 So. 2d at 248. The court noted that although there are other "irrational" reasons why the jury may have held the way it did, *Ashe* required the court to review only possible rational actions of the jury. *Id.*

[99] *Id.* at 246-47. Consequently, the burglary indictment was dismissed with prejudice. *Id.* at 252.

[100] 515 F.2d 20, 21-22 (8th Cir. 1975), *cert. denied*, 423 U.S. 1057 (1976).

[101] 515 F.2d at 21-22.

toppel by the prosecutor against the defendant was approved whether the defendant was convicted or pleaded guilty in the first trial.[102] In *United States v. Colacurcio*,[103] the use of collateral estoppel against the defendant was upheld in spite of the claim that it abridged the defendant's constitutional rights to confrontation of witnesses and to factual determination by a jury. The Court of Appeals for the Ninth Circuit held that the defendant had already been afforded these rights in the first trial.[104]

It is far from settled, however, that the state's offensive use of collateral estoppel is legitimate. Some courts have held that use of collateral estoppel against a defendant is an unconstitutional denial of a de novo trial.[105] Furthermore, in *Ashe*, the Supreme Court noted that lack of mutuality could not be raised to prevent use of collateral estoppel in a criminal defense.[106] *Sanders* sheds no light upon the matter because, although critical of *Ashe*, the criticism does not directly implicate the use of collateral estoppel against a defendant.[107]

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[102] *See* Brazzell v. Adams, 493 F.2d 489, 490 (5th Cir. 1974) (criminal collateral estoppel applies whether defendant pleaded guilty or was tried in first action); Metross v. United States District Court, 441 F.2d 313, 317 (10th Cir. 1970) (same). *But cf.* State Farm Mut. Auto. Ins. Co. v. Worthington, 405 F.2d 683, 686-87 (8th Cir. 1968) (prior guilty plea is not conclusive in subsequent civil action and may be explained).

[103] 514 F.2d 1 (9th Cir. 1975).

[104] *Id.* at 6.

[105] *See, e.g.*, United States v. DeAngelo, 138 F.2d 466, 468 (3rd Cir. 1943) (accused constitutionally entitled to trial de novo on each fact alleged); United States v. Bruno, 333 F. Supp. 570, 576 (E.D. Pa. 1971) (same). *See generally* Comment, *The Use of Collateral Estoppel Against the Accused*, 69 COLUM. L. REV. 515, 517-20 (1969) (discussion of cases which have allowed use of collateral estoppel against defendant).

[106] *Ashe*, 397 U.S. at 443. The Court stated: " '[i]t is much too late to suggest that this principle [collateral estoppel] is not fully applicable to a former judgment in a criminal case . . . because of lack of 'mutuality' . . . .' " *Id.* (citing United States v. Kramer, 289 F.2d 909, 913 (2nd Cir. 1961).

[107] The court in *Sanders* harshly criticized *Ashe*, stating that it made "no sense" and was "illogical." The court pointed out that there is a "logical infirmity" in applying collateral estoppel to criminal cases. A finding of not guilty does not mean the defendant is innocent, rather, only that the state could not prove guilt beyond a reasonable doubt. Therefore, it is illogical to conclude that the defendant is armed with any finding of fact from the first trial. The court would have preferred to make this decision "in pure double jeopardy terms, never mentioning collateral estoppel." 429 So. 2d at 250-51. At the rape trial, the prosecution also offered evidence that the defendant burglarized the rape victim's home, and this put the defendant in jeopardy for this offense at that trial. *Id.* at 246. The court would have preferred to hold that once in jeopardy for burglary at the rape trial, a subsequent trial on the burglary charge placed defendant in double jeopardy. *Id.* at 251.

V. Severance of Joint Trials

In *Walker v. State*,[108] the Mississippi Supreme Court removed from the discretion of the trial judge the decision whether to sever a joint trial in which the prosecution intends to introduce a statement of one codefendant which would implicate another codefendant. Before *Walker*, the court had held that such a severance was within the discretion of the trial judge and was reversible error only upon a showing of abuse of discretion.[109]

In *Walker*, codefendant Wicks had made oral and written statements prior to trial implicating Walker in an armed robbery.[110] Counsel for codefendant Walker made a motion for severance on the ground that introduction of the statements would be highly prejudicial to Walker.[111] This motion was denied. Although the trial court held Wicks' statement inadmissible as part of the prosecution's case in chief, the statements which incriminated Walker were admitted to impeach Wicks' testimony.[112] Severance was not required under the confrontation clause of the United States Constitution because Walker had the opportunity to cross-examine Wicks about her statements

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[108] 430 So. 2d 418, 421 (Miss. 1983).

[109] *See* Brown v. State, 340 So. 2d 718, 719 (Miss. 1976) (no abuse of discretion where letters admissible against defendant implicated codefendant). The dissent in *Walker*, 430 So.2d at 421-23 (Roy Noble Lee, J., dissenting), cited much authority for the position that severance should be within the sound discretion of the trial judge. First, Mississippi statutory authority provides that "persons jointly indicted for a felony *may be* tried separately . . . ." Miss. Code Ann. § 99-15-47 (1972) (emphasis added). Clearly, the language of the statute is permissive, not mandatory. Second, the dissenting opinion cited Rule 4.04 of the Uniform Criminal Rules of Circuit Court Practice (1979), which unequivocally states that "[t]he granting or refusing of severances of defendants . . . shall be in the discretion of the trial judge." Third, the dissenters cited Mississippi cases which have consistently held severance to be discretionary. *See, e.g.*, Price v. State, 336 So. 2d 1311, 1312 (Miss. 1976) (severance discretionary, not a matter of right); *accord* Fairly v. State, 349 So. 2d 1050, 1052 (Miss. 1977) (motion for severance after arraignment within court's discretion); Ivory v. State, 336 So. 2d 732, 734 (Miss. 1976) (same).

[110] 430 So. 2d at 419.

[111] *Id.* at 419-20. The fact that Walker's counsel made a timely motion for severance distinguished *Langston v. State*, 373 So. 2d 611, 612-13 (Miss. 1979), in which the defense failed to make a timely motion, and severance was consequently denied. 430 So. 2d at 421 n.2.

[112] 430 So. 2d at 420. In Brown v. State, 340 So. 2d 718, 721 (Miss. 1976), the Mississippi Supreme Court had warned that prosecutors "should not offer, and the trial judge should not admit, in evidence, incriminating statements of a codefendant (implicating the defendant) during the State's case in chief . . . . The statement . . . should be admitted only after the codefendant took the stand and was subject to cross-examination by the defendant."

when Wicks testified.[113] The court in *Walker* concluded that when an accused moves for a severance because a codefendant's statement which implicates the accused may be introduced,[114] the trial court must require the state to elect among three alternatives:[115] (1) a joint trial in which the statement is excluded, (2) a joint trial in which the statement is admitted but the incriminating portions are deleted,[116] or (3) severance.

Although admission into evidence of one codefendant's statement implicating another codefendant is constitutionally permissible, provided the confessing defendant testifies in court,[117] the Mississippi Supreme Court found it unfair. As a result of this decision, there are now

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[113] The confrontation clause of the sixth amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The primary purpose of this rule is to give a defendant an opportunity to cross-examine the witnesses against him. Pointer v. Texas, 380 U.S. 400, 406-07 (1965). The "confrontation" guaranteed by the sixth and fourteenth amendments is confrontation at trial. This guarantee is met if the declarant testifies and can be cross-examined on the witness stand at trial. California v. Green, 399 U.S. 149, 158 (1970). Violation of the right to confrontation occurs in a joint trial where a codefendant's statement implicates other defendants and is admitted without the implicated defendants being given the opportunity to cross-examine the declarant. United States v. Bruton, 391 U.S. 123, 127 (1968). In *Walker*, the fact that Wicks testified at trial subject to Walker's opportunity to cross-examine removed any potential confrontation clause violation.

[114] This applies whether the statement is introduced as part of the prosecution's case in chief or to impeach a codefendant's testimony in the event he testifies at trial. *Walker*, 430 So. 2d at 421.

[115] *Id.* The alternatives named by the court are the same as those enumerated by the American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Joinder and Severance, § 2.3 (Approved Draft 1968).

Some jurisdictions have judicially adopted the ABA Proposed Draft. *See, e.g.*, Close v. United States, 450 F.2d 152, 153-54 (4th Cir. 1971), *cert. denied*, 405 U.S. 1068 (1972); State v. Herd, 14 Wash. App. 959, 961, 546 P.2d 1222, 1223-24 (1976). At least one state has enacted the rules in statutory form. *See* IND. CODE ANN. § 35-3.1-1-11 (Burns 1979). Other states recognize the rules as a guide to the trial judge's discretion. *See, e.g.*, People v. Allen, 36 Ill. App. 3d 821, 826-27, 344 N.E.2d 825, 828 (1976) (severance discretionary, but should be granted where prosecution refuses to exclude implicating statement or delete offending portions); Bell v. State, 258 Ark. 976, 980-81, 530 S.W.2d 662, 665 (1975).

[116] The deletion alternative may be preferable because the statement is then useable without separate trials. *See* State v. Herd, 14 Wash. App. 959 at 962-63, 546 P.2d at 1224-25. The advantage of joint trials is that they "are more economic and minimize the burden on witnesses, prosecution, and courts. They also avoid delays in bringing those accused of crime to trial." Bruton v. United States, 391 U.S. 123, 143 (1968) (White, J., dissenting).

[117] *See supra* note 113 and accompanying text.

two limitations on a trial judge's discretion whether or not to sever the trials of codefendants. First, a trial judge must sever if it is necessary to protect a defendant's constitutional right to confrontation.[118] Second, even if the codefendant who made the out-of-court statement implicating the co-defendant testifies in court, *Walker* requires that the state elect among the alternatives of exclusion of the statement, admission of the statement with incriminating portions deleted, or severance.[119]

Jonathan B. Fairbank
Sara L. Rosson

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[118] *See supra* note 113 and accompanying text.

[118] *Walker*, 430 So. 2d at 421; *see supra* notes 115-16 and accompanying text. The identical dual limitation was recognized and enunciated in State v. Herd, 14 Wash. App. 959, 961, 546 P.2d 1222, 1223 (1976).

MISCELLANEOUS

In 1983, the Mississippi Supreme Court decided a number of cases concerning domestic relations,[1] wills and estates,[2] insurance,[3] and other

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[1] Decisions handed down in 1983 that are not treated textually include McCuskey v. Jones, 441 So. 2d 1372, 1373-74 (Miss. 1983) (husband's alleged assault on current wife is "controversy" under MISS. CODE ANN. § 13-1-15 (Supp. 1983), such that wife may testify against him in custody suit concerning child from former marriage); Sparkman v. Sparkman, 441 So. 2d 1361, 1362-63 (Miss. 1983) (siblings should not be separated during custody proceedings in absence of unusual and compelling circumstances dictating otherwise); McIlwain v. McIlwain, 441 So. 2d 517, 518 (Miss. 1983) (wife and children should have been granted use of husband's inherited home; husband must refinance loan when present payments are so large he cannot pay alimony and support); Albright v. Albright, 437 So. 2d 1003, 1004-05 (Miss. 1983) (tender age rule is but one factor to be considered in custody determination); Chaffin v. Chaffin, 437 So. 2d 384, 386-87 (Miss. 1983) (improper to award separate maintenance to wife whose conduct was natural factor in separation, but trial court is not precluded from awarding alimony to wife who is at fault); Cunliffe v. Swartzfager, 437 So. 2d 43, 45-46 (Miss. 1983) (where mother conceals whereabouts of child, father may not be held in contempt for failure to pay child support but is liable for amount in arrears); Kavanaugh v. Carraway, 435 So. 2d 697, 700 (Miss. 1983) (revision of custody award must be based on totality of circumstances rather than solely on indiscretion of custodial mother); Parker v. Parker, 434 So. 2d 1361, 1361 (Miss. 1983) (if survivorship is set up in deed but denounced in divorce decree, then decree is a contract that modifies the deed); Ballard v. Ballard, 434 So. 2d 1357, 1360 (Miss. 1983) (change of custody not proper solely because custodial mother's boyfriend spent three nights at her apartment while minor son was present); Gadson v. Gadson, 434 So. 2d 1345, 1347 (Miss. 1983) (when divorce decree is null due to lack of service of process, defendant cannot be held in contempt for failure to comply with decree); Trunzler v. Trunzler, 431 So. 2d 1115, 1116 (Miss. 1983) (because mother is in fiduciary relationship with children, rather than with ex-husband, she may be required to account to children for child support payments); Price v. Price, 430 So. 2d 848, 849-50 (Miss. 1983) (chancellor commits error when he gives no reason to deny one party's motion to amend pleadings when other party did not file a brief); Metts v. State Dep't of Pub. Welfare, 430 So. 2d 401, 405 (Miss. 1983) (seeming conflict between venue provisions in paternity and child support statutes resolved by recognizing mandatory language of paternity statute over permissive language of child support statute); Lowicki v. Lowicki, 429 So. 2d 917, 920 (Miss. 1983) (statute providing for mandatory damages upon affirmance of judgment, MISS. CODE ANN. § 11-3-23 (1972), applies in domestic relations cases); Smith v. Smith, 429 So. 2d 588, 589 (Miss. 1983) (trial court's award of alimony remanded when wife presented evidence suggesting an effort by husband to disperse and conceal assets); Luttrell v. Kneisly, 427 So. 2d 1384, 1387 (Miss. 1983) (standard of proof in termination of parental rights hearing is clear and convincing evidence); In re T.T., a Minor, 427 So. 2d 1382, 1383, 1384 (Miss. 1983) (opinion evidence is proper in termination of parental rights case; family court may direct Department of Public Welfare to institute proceedings to terminate parental rights); Martin v. Putnam, 427 So. 2d 1373, 1377 (Miss. 1983) (adoption should be awarded to close, natural kindred over well-meaning third parties);

miscellaneous topics.[4] Three of the court's decisions concerning domestic relations and one decision regarding insurance will be discussed textually.

Boren v. Windham, 425 So. 2d 1353, 1355 (Miss. 1983) (whether first husband's obligation to pay alimony is void or voidable upon wife's remarriage depends on particular facts of each case); Smith v. Watson, 425 So. 2d 1030, 1034 (Miss. 1983) (father's right to custody is barred when he abandons children).

[2] Wills and estates cases which have not been given textual consideration include Peoples Bank of Mendenhall v. Wyatt, 441 So. 2d 117, 119 (Miss. 1983) (loan guaranty of defaulted loan is contingent claim against estate and is not barred if not raised within statutory period); Ard v. Ard, 438 So. 2d 1356, 1357 (Miss. 1983) (finding of undue influence requires proof that devisee's purpose was to control testator's acts, preventing his free agency); Witt v. Mitchell, 437 So. 2d 63, 66 (Miss. 1983) (constitutionality of descent among illegitimates statute could not be adjudicated if that issue was not included in pleadings pursuant to rules of procedure then in effect); Jones v. Stubbs, 434 So. 2d 1362, 1363 (Miss. 1983) (with regard to intestate succession and representation, predeceased whole-blood brother takes to the exclusion of surviving half-blood sister).

[3] Insurance cases which will not be discussed in the text include these: Allstate Ins. Co. v. Randall, 441 So. 2d 560, 560 (Miss. 1983) (court declined to address uninsured motorist question certified from Fifth Circuit); Brickell v. United States Fire Ins. Co., 436 So. 2d 797, 801 (Miss. 1983) (because the vague and ambiguous "business pursuits" exclusion is construed to favor the insured, it did not apply to appellant even though he put considerable money into enterprise and took over company for liquidation purposes); Brown v. Blue Cross & Blue Shield, 427 So. 2d 139, 140 (Miss. 1983) (public policy disallows insurance company's termination of all benefits without consideration to beneficiaries).

[4] Cases involving other miscellaneous topics that will not be discussed in the text include Noxubee County Democratic Executive Comm. v. Russell, 443 So. 2d 1191, 1194-98 (Miss. 1983) (trial court did not err in failing to discuss election contest because supporting affidavits required under MISS. CODE ANN. § 23-3-45 (1972) failed to state that attorneys had made "independent" investigations of plaintiffs' allegations since no contentions of bias or prejudice had been made; 12-day time limit for a candidate to examine ballot box after box has been "canvassed and reviewed" under MISS. CODE ANN. § 23-3-23 (1972) does not begin to run until executive committee has declared official winner; special election was not required in election contest where four boxes were disqualified because receiving manager and initiating manager were same person since special elections are necessary only when enough illegal votes were cast for contestee to change the result of the election or when so many votes are disqualified that will of the voters is impossible to discern); Riley v. Clayton, 441 So. 2d 1322, 1325-26 (Miss. 1983) (legislature's right to limit appellate review in election cases is statutory privilege correctly reserved to legislature); Allen v. Snowden, 441 So. 2d 553, 555 (Miss. 1983) (use of voting machines was valid; sequentially numbered ballot cards are not subject to initialing process required by Corrupt Practices Act); In re Crechale, 441 So. 2d 120, 121 (Miss. 1983) (the appearance bond provided for in MISS. CODE ANN. § 11-51-12 (Supp. 1983) requires that sureties pay plaintiff amount of judgment owed upon defendant's failure to appear and abide by contempt order); Wiley v. Extension of Corporate Boundaries of Iuka, 441 So. 2d 116, 116-17 (Miss. 1983) (MISS. CODE ANN. § 21-1-15 (1972) requires posting of notice of proposed annexation in area sought to be annexed).

I. Child Custody

In *Cheek v. Ricker*,[5] the Mississippi Supreme Court addressed the issue of modification of a child custody order. The court held that neither a change of residence[6] nor the mother's postdivorce romantic involvement[7] would in themselves constitute a material change in circumstances adversely affecting the welfare of the child.[8]

Hollis and Pamela Cheek were granted a divorce by the Chancery Court of Attala County in July of 1978.[9] With knowledge of Pamela's romantic involvement with another man, Hollis stipulated that she was a fit parent, resulting in Pamela's being granted custody over their son. After the divorce, and upon her graduation from college, mother and son moved to Texas, where she later met and married another man. Hollis had remarried in March of 1979.[10]

In a subsequent suit, the father contended that there had been a material change in circumstances since the divorce such that he should be awarded custody of the child. The chancellor refused to alter the substance of the original custody order.[11] On appeal, the supreme court considered whether the mother's move to Texas, and the resulting strain on the father's visitation privileges, and the mother's post-divorce romantic relationships constituted such a material change in circumstances.[12] There had been testimony below that the child had experienced emotional difficulties.[13] The court noted that to require modification of a child custody order, the change in circumstances must have adversely affected the child.[14]

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[5] 431 So. 2d 1139 (Miss. 1983).

[6] *See infra* note 12 and accompanying text.

[7] *See infra* notes 12, 16 and accompanying text.

[8] 431 So. 2d at 1144-45.

[9] *Id.* at 1141. The chancery courts have jurisdiction over divorce and minors' business. *See* Miss. Const. art. IV, § 159; Miss. Code Ann. § 93-5-23 (1972) (as amended Supp. 1983).

[10] 431 So. 2d at 1141-42. The mother's remarriage occurred after the trial in this case. *Id.* at 1142.

[11] *Id.* at 1141. The supreme court noted that there was "substantial and impressive" testimony that the mother "was a concerned, caring and loving mother." *Id.* at 1142.

[12] *See id.* at 1144.

[13] *See id.* at 1142, 1144. The supreme court noted that there was conflicting evidence as to the cause of the emotional problems. *Id.* at 1145. A psychologist called by the father attributed the child's problems to the mother's relationships with other men. *Id.* at 1142; *see infra* note 16. The psychologist offered by the mother attributed the problem to the divorce itself and the custody fight and refuted the proposition that the mother's relationships with other men caused the problem. *Id.* at 1142.

[14] *Id.* at 1143.

The court ruled that in today's society a change in residence by the custodial parent is not such a material change in circumstances as to "justify a reconsideration of an order for primary custody."[15] Further, the court determined that the mother's romantic relationships[16] did not by themselves constitute a material change adverse to the child's interests.[17] The court analogized this situation to an original award of custody. Since indiscretions by a mother would not per se bar her from custody pursuant to a divorce decree, the same should not preclude custody in a modification proceeding.[18] This holding was reiterated in subsequent cases.[19]

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[15] 431 So. 2d at 1144. This is a more definitive statement of a rule established by earlier cases. *See, e.g.*, Case v. Stolpe, 300 So. 2d 802, 805 (Miss. 1974), *reh'g denied*, 300 So. 2d 802 (Miss. 1974) ("there is actually no material change in the condition of the parties . . . except that the parties live many miles apart"), *cited in Cheek*, 431 So. 2d at 1144; Brocato v. Walker, 220 So. 2d 340, 344 (Miss. 1969) ("adventitious" circumstance of moving 600 miles from noncustodial parent not sufficient to justify modification of child custody decree), *cited in Cheek*, 431 So. 2d at 1144. The *Cheek* court said that "in this day and time many persons must change their residence, sometimes even cross-country, in order to obtain suitable employment, and for *other bona fide reasons.*" *Id.* (emphasis added). This seems to imply that relocation for other reasons, such as to hinder visitation, might cause a geographic change to rise to a level of materiality and adversity to the child's interests that would justify a change in custody.

[16] 431 So. 2d at 1142, 1144. The evidence showed that the mother had had relationships with two different men between May 1978 and the time of the custody trial. *Id.* at 1142. The court distinguished the instant case from one in which custody had been removed from the mother. *See* Pike v. Pike, 317 So. 2d 897, 898-99 (Miss. 1975) (mother had entertained men on several occasions for the night and kept unusual hours), *cited in Cheek*, 431 So. 2d at 1144 n.2. The *Cheek* court also cited for support two cases in which the mother's behavior had been found insufficient to constitute grounds for denial of custody. *See* Case v. Stolpe, 300 So. 2d 802, 804-05 (Miss. 1974) (wife lived with another man, whom she later married); Rodgers v. Rodgers, 274 So. 2d 671, 674 (Miss. 1973) (evidence insufficient to show mother unfit).

[17] 431 So. 2d at 1144-45.

[18] *Id.* There is considerable authority for awarding custody to the mother despite the fact that the divorce was grounded upon her adultery. *See, e.g.*, Yates v. Yates, 284 So. 2d 46, 47 (Miss. 1973) (adulterous mother granted custody if that is in best interest of child); Anderson v. Watkins, 208 So. 2d 573, 574 (Miss. 1968) (same); Schneegass v. Schneegass, 194 So. 2d 214, 216 (Miss. 1966) (custody may be awarded to adulterous mother where child is of tender age); Winfield v. Winfield, 203 Miss. 391, 395, 35 So. 2d 443, 444 (1948) (exceptional circumstances may justify award of custody to adulterous mother).

To support its holding that custody modification proceedings should be no different, the court cited cases from other jurisdictions: Roberson v. Roberson, 370 So. 2d 1008, 1011 (Ala. Civ. App. 1979); Rippon v. Rippon, 64 Ill. App. 3d 465, 381 N.E.2d 70, 73 (1978).

[19] *See* Kavanaugh v. Carraway, 435 So. 2d 697, 700 (Miss. 1983) (indiscretion of custodial parent cannot be used as sole ground for change of custody; rather, trier of fact

The *Cheek* opinion seems to have modified the "tender years" rule as well. By virtue of this doctrine, custody of very young children was awarded to their mother regardless of her misconduct.[20] The effect of the "tender years" rule appears to have been diluted by the court's pronouncement that "it hardly seems rational that the age of a child should per se lead to any particular result."[21] Subsequent decisions have made clear that the "tender years" rule has lost its automatic effect; however, it is still an important consideration in a custody proceeding.[22]

Finally, the *Cheek* court clarified the deference to be accorded chancellors' findings upon review. The court wrote that findings of fact by a chancellor, whether of an evidentiary or of an ultimate nature, "may not be set aside or disturbed on appeal unless manifestly wrong."[23] This standard for review seems to parallel the "clearly erroneous" standard of Federal Rule of Civil Procedure 52 (a) and its Mississippi counterpart.[24]

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must look to totality of circumstances); Ballard v. Ballard, 434 So. 2d 1357, 1359-60 (Miss. 1983) (change of custody not warranted solely because custodial parent's boyfriend spent three nights at her apartment while child was present).

[20] Mitchell v. Mitchell, 218 Miss. 37, 40, 65 So. 2d 265, 266 (1953); *see also* Anderson v. Watkins, 208 So. 2d 573, 574 (Miss. 1968) (tender years rule allows award of custody to mother as exception to rule barring custody by adulterous parent); Schneegass v. Schneegass, 194 So. 2d 214, 216 (Miss. 1966) (custody awarded to mother despite adultery in view of tender age of children); Nix v. Nix, 253 Miss. 565, 570, 176 So. 2d 297, 300 (1965) (adulterous mother may be awarded custody of children of tender years; however, child of six is no longer of tender years) (citing Winfield v. Winfield, 203 Miss. 391, 395, 35 So. 2d 443, 444 (1948)). For additional illustrations of this rule, see Kyzar v. Kyzar, 248 Miss. 49, 62-63, 157 So. 2d 770, 771 (1963), and the cases cited therein, and J. BUNKLEY AND W. MORSE, AMIS ON DIVORCE AND SEPARATION IN MISSISSIPPI § 219 (1957).

[21] 431 So. 2d at 1145.

[22] In Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983), the court stated that while the "tender years" doctrine "is a principle which is weaker than in past years," it is still a consideration to be used in determining the course of action that will be in the best interest of the child. *Id.* at 1005 (citing *Ex parte* Devine, 398 So. 2d 686, 689-97 (Ala. 1981); Watts v. Watts, 77 Misc. 2d 178, 350 N.Y.S.2d 285, 287-91 (1973); MISS. CODE ANN. § 93-13-1 (1972)).

[23] It had been suggested that in such a case the justices sit as "chancellors" and, therefore, could freely review the lower court's findings of fact. *See Cheek*, 431 So. 2d at 1143 & n.1.

[24] *See* FED. R. CIV. P. 52(a) ("[f]indings of fact shall not be set aside unless clearly erroneous"); MISS. R. CIV. P. 52(a) (same). The court seems to link its "manifestly wrong" standard with the "clearly erroneous" standard of the rules of procedure by citing for support Pullman-Standard v. Swint, 456 U.S. 273, 285-87 (1982), which dealt with findings of fact by federal judges sitting without a jury. For an analysis of the clearly erroneous standard of rule 52(a), see Comment, *An Analysis of the Application of the Clearly Erroneous Standard of Rule 52(a) to Findings of Fact in Federal Nonjury*

II. Child Support

In *Tedford v. Dempsey*,[25] the Mississippi Supreme Court considered the effect of subsequent changes in circumstances on child support awards. The court stated that the fact that the support agreement did not anticipate foreseeable changes in circumstances did not constitute a waiver by the mother to any future increases. In order to prevent future modification litigation, the court stated that parties to a support agreement "generally ought to be required to include escalation clauses."[26] Further, a claim that the mother knew at the time of the agreement that she would soon marry a wealthy man would not preclude her from seeking increased support.[27] Additionally, the court ruled that it is immaterial whether the mother fulfills her support obligations from her own resources or from those of her new husband.[28] Finally, the court ruled that the father's obligation should not be minimized due to the wealth of the mother's new husband.[29]

James and Marie Tedford filed for a divorce grounded on irreconcilable differences on March 20, 1979.[30] The requisite separation agreement[31] provided that Marie would have custody of the couple's two children, then aged eight and five, and that James would provide $250 per month in support. About a month later, before ratification of the agreement by the chancellor, James lost his job. He then found another job, which provided him with take-home pay of about $125 per week. On May 22, 1979, the support agreement was amended to require James to pay $150 per month. On May 24, 1979, the agreement was ratified by the chancellor. On June 11, 1979, Marie married another man, acknowledged to be "a person of some means,"[32] and she and the children moved into his house. Marie, who had worked earlier, quit working upon her remarriage.[33] James' circumstances had changed as

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Cases, 53 Miss. L.J. 473 *passim* (1983).

[25] 437 So. 2d 410 (Miss. 1983).

[26] *Id.* at 419-20 & nn.7-9.

[27] *Id.* at 420.

[28] *Id.* at 421 & n.10.

[29] *Id.* at 420, 421-22.

[30] *Id.* at 414.

[31] *See* Miss. Code Ann. § 93-5-2 (1972) (as amended Supp. 1983) (parties must make written provision for custody and support of children for divorce to be granted on this ground).

[32] 437 So. 2d at 415.

[33] *Id.* Marie had worked for a company of which her new husband had been president. Although the chancellor allowed no evidence of the new husband's wealth, the court noted that after Marie quit working and began living off resources provided by the new husband, her standard of living increased. *Id.*

well; on June 6, 1981, he remarried. At the time of the appeal, he and his wife were bringing home approximately $1721 per month.

In September of 1981, Marie sought an increase in child support. Finding that James' increased income and the increasing amount required to support the children constituted a substantial change in circumstances such that James should be required to contribute more toward the children's support, the Chancery Court of Clay County ordered that James' payments be increased to $70 per week.[34] On appeal, the Mississippi Supreme Court affirmed.[35]

The supreme court in *Tedford* laid the foundation for its opinion by stating the standard for modification of child support decrees: there must be a substantial or material change in the circumstances of one or more of the interested parties arising subsequent to the decree.[36] The court carefully noted that the rules governing modification of a court-ratified child support agreement filed pursuant to an irreconcilable differences divorce, such as that in the instant case, would be the same as if the award had been entered following a contested divorce.[37]

The court indicated that an increase in the children's needs caused by their participation in more activities and by the simple fact that it is more expensive to feed, clothe, and support children as they grow older may suggest an increase in support.[38] Also, the aggravating effect of the inflation rate may be considered.[39] The court further held that the fact that these changes may have been foreseeable at the time of the execution of the agreement did not render them immaterial,[40] nor did it constitute a waiver of future increases not to have provided for

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[34] *Id.* at 415-18.

[35] *Id.* at 423.

[36] *Id.* at 417 (citing Bracey v. Bracey, 408 So. 2d 1387, 1389 (Miss. 1982); J. BUNKLEY AND W. MORSE, *supra* note 20, at § 9.05 (Supp. 1980)).

The court pointed out that this standard does not allow modification of support decrees for "slight" changes in the parties' circumstances. 437 So. 2d at 418 (citing Keller v. Keller, 230 So. 2d 808 (Miss. 1970)). The *Tedford* opinion expresses the justices' desire that "disruptions in post-divorce domestic tranquility" be held to a "tolerable minimum." 437 So. 2d at 417. In fact, until there has been a material change in circumstances, the original decree is res judicata. *See* Savell v. Savell, 49 So. 2d 726, 727 (1951)(officially unreported opinion).

[37] 437 So. 2d at 417; *see also* Taylor v. Taylor, 392 So. 2d 1145, 1147-49 (Miss. 1981) (alimony agreement pursuant to irreconcilable differences divorce is subject to modification just as any other decree), *cited in Tedford*, 437 So. 2d at 417.

[38] *See* 437 So. 2d at 415, 418.

[39] *Id.* at 418 (citing Bracey v. Bracey, 408 So. 2d 1387, 1389 (Miss. 1982); McKee v. McKee, 382 So. 2d 287, 289 (Miss. 1980)).

[40] *See* 437 So 2d at 418, 419.

them in the original decree.[41] However, because such fluctuations may be foreseeable, the court suggested that future child support agreements include "escalation clauses tied to the parents' earnings or to the annual inflation rate or to some factored combination of the two."[42]

The court in *Tedford* also stated that a substantial increase in the father's resources can constitute a material change in circumstances supporting modification of the support award.[43] Finally, the *Tedford* opinion ruled that the mother's remarriage was of no effect upon the father's support obligations.[44] It was immaterial whether Marie planned to remarry,[45] that her new husband was wealthy, and that she was meeting her obligations to support the children from her new husband's resources. The court found that the duty of parents to support their children operates to sustain the effect of the decree.[46]

III. Habitual and Excessive Use of Drugs

In *Ladner v. Ladner*,[47] the Mississippi Supreme Court considered

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[41] *Id.* at 419.

[42] *Id.* (footnote omitted). The court based this authority on the chancellor's statutory duty to determine whether the parties have made adequate provisions for the welfare of the children. *See* Miss. Code Ann. § 93-5-2 (Supp. 1983). The opinion declares that the statute contains a "major defect" in that the voluntariness of the support agreement allows one party, "generally the husband," to "blackmail" the other into minimizing support payments. The court called upon the legislature to remedy this defect. 437 So. 2d at 419 n.9. The court took judicial notice of the frequency with which lawyers draft escalation clauses into contracts to deal with changing circumstances. The court further noted that each escalation clause would have to be negotiated individually, and that there might be some situations in which a decrease in support would be appropriate. *Id.* at 419 nn.7-8; *see also* Davis v. Davis, 217 Miss. 313, 316, 64 So. 2d 145, 146 (1953) (either reduction in children's needs or decrease in father's income will justify reduction of support).

[43] 437 So. 2d at 418 (citing Bracey v. Bracey, 408 So. 2d 1387, 1389 (Miss. 1982)).

[44] 437 So. 2d at 420-22. The court specifically pronounced that, although a stepfather stands *in loco parentis*, he is not obligated to support the children in the absence of certain circumstances. *Id.* at 421 n.10 (citing Mears v. Mears, 213 N.W.2d 511, 518 (Iowa 1973)) (stepfather is liable only for increase in children's needs caused by his higher standard of living). The court thus rejected the contrary viewpoint expressed in Amis on Divorce and Separation in Mississippi as "general and unsupported." 437 So. 2d at 421 n.10 (citing J. Bunkley & W. Morse, *supra* note 20, at 233 (1957)).

The opinion suggests that, as a practical matter, the resources made available to the mother by a new husband should be considered by the chancellor to fix the amount of support necessary. *See* 437 So. 2d at 422.

[45] 437 So. 2d at 419-20; *see also supra* note 40 and accompanying text (foreseeability of remarriage does not constitute waiver of future increases).

[46] *See* 437 So. 2d at 420-22.

[47] 436 So. 2d 1366 (Miss. 1983).

the operation of section 93-5-1 (6) of the Mississippi Code,[48] which allows divorce grounded on "[h]abitual and excessive use of opium, morphine or other like drug."[49]

Robert and Alice Ladner were first divorced in 1973. The parties were remarried in 1974, at which time Alice had been assured that Robert was free of drugs and alcohol.[50] Some six weeks later Robert began suffering from depression, and doctors prescribed dosages of a number of drugs,[51] some of which he took daily from that time until the parties were separated.[52]

Robert's intake of drugs affected his attitudes and actions. Mrs. Ladner testified that he fluctuated between hyperactivity and lethargy. His work habits diminished, and he spent their son's savings account to pay bills.[53] The couple had no social contact with anyone but relatives. The child began to show signs of strain as well.[54] Mrs. Ladner sought, and was granted, a divorce grounded on her husband's use of drugs.[55] In addition, she was granted custody of the child and an award for his support. Mr. Ladner appealed, and Mrs. Ladner appealed the chancellor's refusal to award her attorney's fees.[56]

The supreme court began its analysis by defining the operative words of the statute " 'according to their common and ordinary acceptation and meaning.' "[57] The court began by construing the statute's

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[48] MISS. CODE ANN. § 93-5-1 (1972) states in pertinent part: "Divorces from the bonds of matrimony may be decreed to the injured party for any one or more of the following twelve causes, viz:

. . . Sixth. Habitual and excessive use of opium, morphine or other like drug."

The *Ladner* opinion also addressed issues relating to discovery. *See* 436 So. 2d at 1369-72. This portion of the decision is discussed in another section of the Supreme Court Review. *See 1983 Mississippi Supreme Court Review, Civil Procedure,* 54 MISS. L.J. 73, 89-95 (1984).

[49] *See supra* note 48.

[50] 436 So. 2d at 1368.

[51] *Id.* at 1368-69. These included barbiturates, amphetamines, and other drugs, such as Dalmane, Ativan, Nolundar, Mellaril, Sinequan, Vivactil, Talwin, Tylenol No. 3 with Codeine, and Libriam. There was testimony that Ladner was not truthful with his doctors concerning his usage, and he exceeded the prescribed dosage. *Id.* at 1369, 1375.

[52] 437 So. 2d at 1369.

[53] *Id.* Mr. Ladner continued to receive an income of about $23,000 in the year of the divorce. *Id.*

[54] *See id.* The Ladners' son was 14 years old at the time of trial. Friends did not visit him at home, and the youth became nervous and complained of psychologically based physical complaints. *Id.* at 1368, 1369.

[55] *Id.* Her husband had cross-filed for a divorce on the ground of habitual drunkenness. *Id.*

[56] *Id.*

[57] *Id.* at 1373 (quoting MISS. CODE ANN. § 1-3-65 (1972)).

use of "habitual" to require a showing that the defendant spouse "customarily and frequently uses drugs."[58] "Excessive" use of drugs was defined as meaning that "the guilty spouse must be so addicted that he cannot control his appetite for drugs whenever the opportunity to obtain drugs is present."[59] The court tempered that finding by granting an exception when the drugs were prescribed by a physician "for legitimate reasons."[60] The court decided that the phrase "other like drug" refers to drugs which have the same effect as opium and morphine,[61] rather than to drugs that are similar in chemical composition.[62] Those effects could include inability to support wife or family, inability to properly conduct business affairs, and incapacity to perform marital duties, or "causing the marital relationship to be repugnant to the innocent spouse."[63]

Finally, the court applied the statute as construed to the facts before it and ruled that the pattern of Ladner's drug use[64] and the symptoms exhibited by him[65] fell within the scope of the statutory language.[66] Curiously, the court never addressed the fact that Ladner's drugs were prescribed for him by physicians to alleviate depression.[67] This would seem to place him squarely within the "prescription exception," and, in fact, mirrors the situation in one of the cases cited as support for the exception.[68] Perhaps the court thought his misrepresentations to his physicians sufficient to outweigh the equitable consid-

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[58] 436 So. 2d at 1373 (citing BLACK'S LAW DICTIONARY 640 (5th ed. 1979)).

[59] 436 So. 2d at 1374. The court discussed Jasper v. Jasper, 333 Mass. 223, 129 N.E.2d 887 (1955) and Rindlaub v. Rindlaub, 19 N.D. 352, 125 N.W. 479 (1910) and cited Burt v. Burt, 168 Mass. 204, 46 N.E. 622 (1897). 436 So. 2d at 1374 & n.5.

[60] 436 So. 2d at 1374. The court based the exception on cases from other jurisdictions. The complaints in these cases had alleged excessive or habitual drug use, but these grounds were rejected where in each case the drugs had been used for medical reasons. *See* Jasper v. Jasper, 333 Mass. 223, 129 N.E.2d 887, 889 (1955); Rindlaub v. Rindlaub, 19 N.D. 352, 125 N.W. 479, 496 (1910).

[61] 436 So. 2d at 1374-75.

[62] *See id.*; J. BUNKLEY & W. MORSE, *supra* note 20, at § 3.13 (1957).

[63] 436 So. 2d at 1375.

[64] *See supra* notes 50-52 and accompanying text.

[65] *See supra* notes 53-54 and accompanying text.

[66] *See* 436 So. 2d at 1375.

[67] *See supra* notes 51-52, 60 and accompanying text.

[68] In Jasper v. Jasper, 333 Mass. 223, 129 N.E.2d 887 (1955), the trial judge had found that because the drugs had been prescribed for the defendant for depression, she had not voluntarily acquired a drug habit. The Supreme Judicial Court of Massachusetts, affirming the trial court, gave no definitive statement of the exception, but it seems reasonable to view the case as supporting the exception. *See* 129 N.E.2d at 889.

erations underlying the exception.[69] It would have been helpful had the court chosen to resolve this.

IV. Recovery of Extra-Contractual Damages on Insurance Contracts

In *Reserve Life Insurance Co. v. McGee*,[70] the Mississippi Supreme Court considered the issue of punitive damages for breach of an insurance contract. The facts as stated by the majority[71] show that one Henry McGee applied for a hospitalization policy in February of 1980. An agent, Bill Nunn, completed the application form, which contained specific questions regarding the applicant's health. Each required either a "yes" or "no" response. McGee testified that Nunn did not read each question to him but rather asked him in general terms about his health. Both McGee and Nunn testified that McGee told Nunn that he was in "good" health, and Nunn testified that he wrote on the application that McGee's health was "excellent." Nunn was told that while McGee had not been confined to a hospital during the past five years, he had seen a Dr. Bobo, and McGee executed written authority for Reserve Life to contact Bobo and acquire any medical information from him that was needed. Reserve Life issued McGee a policy dated March 16, 1980.

In September of 1980, McGee filed a claim after a nine-day hospitalization for removal of a lesion from his bladder. On December 3, McGee received a form from the company stating that it needed more information. On December 14, he was readmitted to the hospital for five days. On January 12, 1981, McGee received notice that the company's file about the September 16 hospitalization was still incomplete. In a letter dated February 12, 1981, Reserve Life notified McGee's attorney that it would be liable only for a refund of the premiums paid. The letter revealed that Reserve Life had investigated McGee's medical history and had learned of pre-1980 office visits to Dr. Bobo for a condition "which would have been pertinent to our acceptance of Mr. McGee for coverage."[72] The letter said that had the company known of

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[69] *See* 436 So. 2d at 1375; *cf.* Rindlaub v. Rindlaub, 19 N.D. 352, 125 N.W. 479, 496 (1910) ("[i]f such a habit is reasonably and necessarily caused by conditions over which the victim has no control, it would be manifestly harsh and unreasonable to subject such party to such undeserved punishment.").

[70] 444 So. 2d 803 (Miss. 1983).

[71] Justice Bowling wrote for the majority, joined by Chief Justice Patterson and Justices Roy Noble Lee, Hawkins, and Dan Lee.

[72] 444 So. 2d at 804-05.

McGee's history of transient ischemic attack,[73] it would not have issued him coverage.[74] Thus, although Reserve Life did not dispute that the 1980 hospitalization claim would have been covered by the policy, the company treated the policy as cancelled.[75]

McGee filed suit, including what has been called a "bad faith" tort claim[76] requesting punitive damages.[77] Reserve Life asserted as an affirmative defense that McGee had made material misrepresentations on the application for the policy, thus releasing it from liability on the policy pursuant to section 83-9-11(3) of the Mississippi Code.[78]

The trial judge decided that the question of whether Reserve Life should prevail in its affirmative defense should be submitted to the jury. The trial court further concluded that McGee's evidence was sufficient to allow submission to the jury of the question whether punitive damages were appropriate.[79] The jury returned an award for actual and punitive damages.[80]

The Mississippi Supreme Court chose *Reserve Life* as the vehicle for an attempt to clarify the procedures to be followed in a bad faith case. The court reiterated that the guiding principle in such a case is that if the defendant can show legitimate or arguable reasons for its action, then it should not be liable for punitive damages.[81] The procedure to be used was set out at length.

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[73] *Id.* at 805. Transient ischemic attack was defined by Dr. Bobo as a "little stroke." *Id.* at 819 (Walker, P.J., dissenting).

[74] *Id.* at 805. According to the trial court, the company wrote the policy without contacting Dr. Bobo. It waited until the claim was filed and then made an intensive investigation of McGee's medical history. *Id.* at 811. The McGees testified that they were told that the company would contact Dr. Bobo to secure information before issuing the policy. *Id.* at 804.

[75] *See id.* at 808.

[78] *See id.* at 815 (Robertson, J., specially concurring). The majority refused to recognize this term. *Id.* at 807-08. However, it has gained acceptance as shorthand for the cause of action created when breach of an insurance contract is attended by such circumstances as will render the breach an independent tort. *See, e.g.,* Taylor v. United States Fidelity & Guar. Co., 420 So. 2d 564, 565 (Miss. 1982); W. DENTON & W. WALKER, BAD FAITH LITIGATION IN MISSISSIPPI 7 (1981).

[77] *See* 444 So. 2d at 806.

[78] *Id.* at 806, 808. MISS. CODE ANN. § 83-9-11 (1972) states in pertinent part: "(3) The falsity of any statement in the application for any policy covered by sections 83-9-1 to 83-9-21 may not bar the right to recovery thereunder unless such false statement materially affected either the acceptance of the risk or the hazard assumed by the insurer."

[79] 444 So. 2d at 808.

[80] *Id.* at 804.

[81] *Id.* at 807-10 (citing Standard Life of Indiana v. Veal, 354 So. 2d 239, 248-49 (Miss. 1977)).

At the conclusion of the evidence, and at defendant's request, the trial judge must determine as a matter of law whether the insurer had a legitimate or arguable, reasonable reason to deny the claim. Should the court decide that the insurer had such a reason, the trial court should deny punitive damage instructions, even though the jury is asked to decide the issue of compensatory damages.[82]

According to *Reserve Life*, if the trial judge cannot hold as a matter of law that the insurer had "a legitimate and arguable defensive position," but determines that there is a question of fact whether "such situation existed," then the judge must submit that issue to the jury. The trial judge must then decide whether sufficient evidence has been presented by the plaintiff to warrant a punitive damages instruction.[83] The court pointed to a Fifth Circuit discussion of situations from Mississippi cases that had denied punitive damages:[84] if the insurance company " 'defends, rather than settles, a close case' "; if the company " 'honestly contests the amount of damage' "; and if the company contests coverage " 'because the insured has failed to meet a policy condition.' "[85] The *Reserve Life* court also quoted from *Standard Life of Indiana v. Veal*:[86] when an insurance company refuses to pay a " 'legitimate' " claim, and that refusal is based " 'on a reason clearly

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[82] *Reserve Life*, 444 So. 2d at 809.

[83] 444 So. 2d at 809, 810. It is unclear whether prior Fifth Circuit decisions interpreting Mississippi law had taken the approach outlined in *Reserve Life*. In Black v. Fidelity & Guar. Ins. Underwriters, 582 F.2d 984 (5th Cir. 1978), another bad faith case, the Fifth Circuit stated:

> The district court should have determined whether, on these "facts," the insurance company had a legitimate or arguable reason to refuse the claim. . . . If there is no arguable basis under Mississippi law for contending that the oral representation was ineffective, plaintiff is entitled to have the issue of punitive damages submitted to a jury, which would be required to determine whether the representation was in fact made.

582 F.2d at 990-91 (footnote omitted).

In Bogel v. American War Home Serv. Corp., 695 F.2d 877, 883 (5th Cir. 1983), the Fifth Circuit interpreted *Veal* to mean that "if the insurer offers no justifiable reason or arguable basis under Mississippi law for denying a valid claim, the judge must submit to the jury the issue whether punitive damages are owed," (citing *Black*, 582 F.2d at 990-91).

[84] *Id.* at 810 (discussing Henderson v. United States Fidelity & Guar. Co., 620 F.2d 530, 536 (5th Cir. 1980)).

[85] *Reserve Life*, 444 So. 2d at 810 (quoting Henderson v. United States Fidelity & Guar. Co., 620 F.2d 530, 536 (5th Cir. 1980)). The *Henderson* court cited Farmers Gin Co. v. St. Paul Mercury Indem. Co., 186 Miss. 747, 191 So. 415 (1939); Progressive Casualty Ins. Co. v. Keys, 317 So. 2d 396 (Miss. 1975); Lincoln Nat'l Life Ins. Co. v. Crews, 341 So. 2d 1321, 1322 (Miss. 1977).

[86] 354 So. 2d 239, 247 (Miss. 1978).

contrary to the express provisions of its own policy,' "[87] then punitive damages may be awarded.

Affirming the award of punitive damages at trial, the *Reserve Life* court found that there was sufficient evidence to raise a jury question as to whether McGee had made material, false statements on the application which gave Reserve Life sufficient reason to cancel the policy. The court also found that a jury question was presented as to whether Reserve Life had an arguable or legitimate reason to cancel the policy. Finally, the supreme court determined that there was sufficient evidence to justify an award of punitive damages.[88]

At this writing, it is not clear what effect *Reserve Life* has on Mississippi's rules for awarding punitive damages in suits on insurance contracts. It can be argued that under *Reserve Life,* the presence of a jury question as to the company's liability on the policy does not preclude a punitive damages instruction when the evidence also presents a jury question as to whether the company had a legitimate or arguable reason for its action.[89] Beyond this and the majority's three-step procedural outline,[90] it remains for future cases to determine the import of *Reserve Life* in this developing area of Mississippi law.

Russell Thomas Infinger

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[87] 444 So. 2d at 808 (quoting 354 So. 2d at 248).

[88] 444 So. 2d at 812.

[89] *See id.* The court pointed out that the company had not asked the trial judge to rule as a matter of law whether it had a legitimate or arguable reason for its action, but asked only for instruction that the jury find for the defendant. *See id.* at 809.

[90] *See id.* at 809-10; *see also supra* text accompanying notes 82-83.

PROPERTY

The Mississippi Supreme Court issued twenty-two opinions in the area of property law during the 1983 term.[1] Although most of these

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[1] *See* Nunnery v. Abdo, 441 So. 2d 1383, 1385-86 (Miss. 1983) (absent express agreement, lease payments accrue until lease properly terminated); Webster v. Kennebrew, 443 So. 2d 850, 858-61 (Miss. 1983) (issue of compliance with MISS. CODE ANN. § 91-5-1 (1972) is proper jury question; rule excluding testimony of witness who heard previous testimony not properly invoked where witness heard only three minutes of previous testimony); Woodland Hills Conservation Ass'n, Inc. v. City of Jackson, 443 So. 2d 1173, 1180-81 (Miss. 1983) (deference to city council in zoning matters unless council's action arbitrary, capricious and unreasonable); Bridges v. City of Jackson, 443 So. 2d 1187, 1190 (Miss. 1983) (rezoning denial improper where overwhelming evidence existed to the contrary); Hall v. Wood, 443 So. 2d 834, 841 (Miss. 1983) (clearing land without taking adequate measures to prevent erosion not legitimate use of property); Mills v. Damson Oil Corp., 437 So. 2d 1005, 1006, 1007 (Miss. 1983) (latent defect in acknowledgement imparts constructive notice, and where grantee had knowledge of nature of homestead property at time of conveyance grantor/wife may assert after-acquired title); Washington County Bd. of Supervisors v. Greenville Mill, 437 So. 2d 401, 404 (Miss. 1983) (county's discrimination of taxable ratios regarding real versus personal property unconstitutional); Bay Springs Forest Prod. Inc. v. Wade, 435 So. 2d 690, 696 (Miss. 1983) (proper measure of damages for converted lumber is fair market value delivered; prior question of fact determination not overturnable); Cotton v. McConnell, 435 So. 2d 683, 685 (Miss. 1983) (where there are no specific findings of fact, court should assume resolution in favor of appellee; relief of consequences of imprudent acts by party not province of court); Goodwin v. McMurphy, 435 So. 2d 639, 642 (Miss. 1983) (deed conveying homestead property not valid unless signed by the spouse of owner when owner is married and living with spouse); Overby v. Cavanaugh, 434 So. 2d 1365, 1366 (Miss. 1983) (land description fails when too ambiguous and no extrinsic evidence is offered to clarify); Parker v. Parker, 434 So. 2d 1361, 1362 (Miss. 1983) (property disposition agreement incorporated into divorce decree terminated joint tenancy); Whiteway Finance Co., Inc. v. Green, 434 So. 2d 1351, 1353 (Miss. 1983) (dragnet clause from prior instrument enforceable until satisfied); Andrews v. Lake Serene Property Owners Ass'n, Inc., 434 So. 2d 1328, 1333 (Miss. 1983) (term "lot" in a protective covenant means areas actually fitting that description at the time the covenant is created); Johnston v. Stinson, 434 So. 2d 715, 719 (Miss. 1983) (stipulations agreed to by parties for damages for breach of an agricultural lease are binding); Peoples Bank & Trust Co. v. L. & T. Developers, Inc., 434 So. 2d 699, 713 (Miss. 1983) (absent express agreement, a construction lender owes duty of reasonable diligence to subordinated landowner lienor to see that funds are actually used in project); Morgan v. Morgan, 431 So. 2d 1119, 1122 (Miss. 1983) (fraudulent deed will not defeat innocent party's defense of laches); Hewlett v. Henderson, 431 So. 2d 449, 451 (Miss. 1983) (grantor's continued use after conveyance presumed to be subordinate to grantee's title); Culbreath v. Johnson, 427 So. 2d 705, 709 (Miss. 1983) (findings supported by substantial evidence based on testimony of expert not disturbed under scope of review); Johnson v. Brewer, 427 So. 2d 118, 122, 126 (Miss. 1983) (fraudulent misrepresentation in procurement coupled with grossly inadequate consideration negated gas

decisions reiterated established principles of property law, significant changes were announced in regard to foreclosure sales[2] and due-on-sale clauses.[3]

I. Adequacy of Consideration in Foreclosure Sales

The supreme court has, over the years, grappled with challenges to foreclosure sales in which the sole issue was whether the consideration paid for the property at a foreclosure sale was sufficient to justify the mortgagee's forced sale.[4] Traditionally, the court has resolved these challenges by either setting aside the foreclosure sale when the sale price was so inadequate "as to shock the conscience"[5] or summarily validating the sale.[6]

In *Central Financial Services, Inc. v. Spears*,[7] the Mississippi Supreme Court approved an alternate remedy available to mortgagors

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lease); Richardson v. Langley, 426 So. 2d 780, 784-85 (Miss. 1983) (ingestion of substances potentially mind effective or causing mere weakness of intellect does not meet standard of total lack of capacity necessary to set aside deed).

[2] Central Fin. Servs., Inc., v. Spears, 425 So. 2d 403 (Miss. 1983).

[3] First Nat'l Bank of Vicksburg v. Caruthers, 425 So. 2d 403 (Miss. 1983).

[4] *See, e.g.*, Peoples Bank & Trust Co. v. L. & T. Developers, Inc., 434 So. 2d 699, 709 (Miss. 1983) (judicial comment on shockingly inadequate bids of 2.68% and 4.65% of fair market value); Myles v. Cox, 217 So. 2d 31, 35 (Miss. 1968) (factual determination that bid price did not shock conscience upheld); Rains v. Thorp Fin. Corp., 250 Miss. 320, 326, 165 So. 2d 151, 153 (1964) (peremptory instruction required where bid price was only 12 ½% of estimated value); Triplett v. Bridgforth, 205 Miss. 328, 346-47, 38 So. 2d 756, 761 (1949) (bid of 50% of true value not set aside on ground of inadequacy alone); Harris v. Bailey Ave. Park, Inc., 202 Miss. 776, 789-90, 32 So. 2d 689, 691 (1947) (where purchaser took subject to liens, bid of 42% of value was adequate); Home Owners Loan Corp. v. Wiggins, 188 Miss. 750, 760, 195 So. 339, 340-41 (1940) (court declared bid of 50% of fair value to be adequate); Anthony v. Bank of Wiggins, 183 Miss. 885, 894, 184 So. 626, 628 (1938) (where indebtedness held by mortgagee equaled value of security, inadequate bid was insufficient to set aside sale); Hardin v. Grenada Bank, 182 Miss. 689, 713, 180 So. 805, 812 (1938) (impact of depression cited as basis for denying relief from a bid price of 12 ½% to 20% of fair value); Wheeler v. Cleveland State Bank, 174 Miss. 542, 553, 164 So. 400, 402 (1935) (under attendant circumstances bid of less than 10% of fair market value not grossly inadequate); Federal Credit Co. v. Boleware, 163 Miss. 830, 835, 142 So. 1, 2 (1932) (inadequate bid must produce an exclamation of the inequality of it); Federal Land Bank v. Robinson, 160 Miss. 546, 556, 134 So. 180, 183 (1931) (bid of 19% of fair market value wholly inadequate); Hesdorffer v. Welsh, 127 Miss. 261, 270, 90 So. 3, 4 (1921) (resale price 12 times amount of bid; inadequate bid); Weyburn v. Watkins, 90 Miss. 728, 735, 44 So. 145, 146 (1907) (bid of 40% of actual value not shocking to the conscience).

[5] *See infra* notes 18-23 and accompanying text.

[6] *See infra* notes 25-29 and accompanying text.

[7] 425 So. 2d at 403.

who challenge the adequacy of consideration in foreclosure sales.[8] Spears executed a promissory note and deed of trust covering real property in favor of C.F.S. as security for a $1,250.00 loan.[9] Payments on the loan fell into arrears, whereupon C.F.S. instituted foreclosure proceedings. C.F.S. purchased the property at the sale, bidding $1458.86,[10] and, twelve days later, sold the property for a considerable profit.[11] Spears commenced an action in chancery to have the foreclosure sale set aside because of the alleged inadequacy of the price paid by C.F.S. for the property. The chancellor sustained the defendants' demurrer.[12] The plaintiff appealed to the supreme court and the case was reversed and remanded for a trial on the merits. The basis of the court's decision was that the allegation of inadequacy of consideration, if proved, was so gross "as to shock the conscience of [the] court."[13] The lower court thereafter found that the amount paid at the foreclosure sale shocked the conscience of the court, and that the mortgagor, Spears, was entitled to the difference between the fair market value of the property and the foreclosure sale price. C.F.S. appealed.[14]

Justice Sugg reaffirmed "the general rule that mere inadequacy of price is not sufficient to set aside a foreclosure sale unless the price is so inadequate as to shock the conscience of the court."[15] The court concluded that the chancellor's finding of inadequacy of sale price was supported by the evidence and proceeded to examine the appropriateness of the chancellor's remedy. The underlying premise of the chancellor's remedy, namely denying the mortgagee an unjust windfall to the mortgagor's detriment, was approved. The court, nonetheless, modified the chancellor's decree by awarding to Spears the difference be-

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[8] *Id.* at 405.

[9] *Id.* at 403.

[10] *Id.* The bid price equaled the amount of the debt due plus costs of the sale. Spears had been delinquent in payment on a prior occasion but stopped foreclosure at that time by bringing his debt current and paying the cost of the proceedings. *Id.*

[11] *Id.* On October 24, 1979, C.F.S. sold the property to Joe Stewart and Earl Aycock for $4,000, paid a $30 judgment lien, and realized a profit of $2,481.14. *Id.* at 403-04.

[12] *Id.*

[13] *Id.* The court first announced this standard in Weyburn v. Watkins, 90 Miss. 728, 735, 44 So. 145, 146 (1907), declaring that it was settled law in this state that "a sale of land . . . otherwise valid, will not be set aside for mere inadequacy of price unless the inadequacy is such as to shock the conscience."

[14] 425 So. 2d at 404.

[15] *Id.* at 404-05. The court noted that prior cases addressing the issue of adequacy of consideration were decided during times of economic depression, implying that adequacy is to be judged against the background of the economic conditions existing at the time of the sale. *Id.*

tween the resale price paid to C.F.S. and the price paid by C.F.S. at the foreclosure sale.[16]

It should be noted that the court's commitment to the vague standard of unconscionability leaves the trial courts in doubt as to when this new remedy should be utilized. Prior Mississippi Supreme Court pronouncements on the issue of adequacy of consideration in foreclosure sales do not indicate a standard by which one can determine when the conscience will be shocked.[17]

In *Hesdorffer v. Welsh*[18] the supreme court set aside a foreclosure sale where the property was purchased for $100 and immediately resold for $1200.[19] The court apparently felt that such a discrepancy was so grossly inadequate as to be summarily rejected, yet *Hesdorffer* offered no rationale or guidance as to what constitutes inadequacy of sales price.[20]

Recoupment on grounds of inadequate bid price was sought by a mortgagor in *Federal Land Bank v. Robinson.*[21] The mortgagee purchased the property at foreclosure for $5,000, yet later testimony showed a market value of $35,000 to $60,000.[22] The court based its decision to grant recoupment on a valuation of $26,000, indicating that a sale bringing about twenty percent of actual value was unconscionable.[23]

However, in *Hardin v. Grenada Bank*[24] the supreme court refused to set aside a foreclosure sale where the security was purchased for less than twenty percent of its actual value.[25] The *Hardin* court reiterated

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[16] The chancellor had ordered that the difference between the fair market value ($6,000) and the amount bid by C.F.S. be returned to Spears. *Id.* The Mississippi Supreme Court, however, felt that C.F.S. should not be required to suffer any pecuniary loss and held that Spears could recover the difference between the amount bid and the $4,000 received by C.F.S. from the resale. *Id.*

[17] *See generally* Note, 53 Miss. L.J. 533, 536-44 (1983) (survey of Mississippi unconscionability standards).

[18] 127 Miss. 261, 90 So. 3 (1921).

[19] *Id.* at 263-64, 269-70, 90 So. at 4, 6. In *Hesdorffer,* the security was first purchased in foreclosure for $400. When the buyer attempted to resell the property three years later, defects in the foreclosure sale were discovered. A curative sale was held, at which Hesdorffer (the original buyer) purchased the property for $100. *Id.* at 263-64, 90 So. at 4.

[20] *Id.* at 270, 90 So. at 6. The court merely stated that the chancellor was "well-warranted" in finding that the $100 bid was inadequate. *Id.*

[21] 160 Miss. 546, 134 So. 180 (1931).

[22] *Id.* at 561, 134 So. at 183-84.

[23] *Id.*

[24] 182 Miss. 689, 180 So. 805 (1938).

[25] *Id.* at 714, 180 So. at 812.

the unconscionability standard and held that under the circumstances[26] the conscience of the court was unmoved.

The standard was again cited as the controlling determinant in *Myles v. Cox*.[27] Recognizing that the conscience of the court was at best an "indefinite standard,"[28] the court concluded that a foreclosure sale which brought between forty and fifty percent of actual value[29] was not unconscionable.

II. Enforceability of Due-on-Sale Clauses

In *First National Bank of Vicksburg v. Caruthers*,[30] the Mississippi Supreme Court overruled prior case law and held that due-on-sale clauses are automatically enforceable.[31] Due-on-sale clauses are contractual provisions commonly used by mortgagees to accelerate any outstanding debt upon transfer or sale of the mortgaged property.[32] Such clauses gained popularity in the 1960s,[33] when spiraling interest

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[26] The court noted that the foreclosure sale at issue occurred during the throes of the depression, when land values generally had been driven to exceedingly low levels. *Id.* It is noteworthy that other jurisdictions during the depression era reacted to the surge of foreclosure sales with considerably more creativity and compassion. Many courts adopted the notion that they had inherent power to develop methods to protect mortgagors when the demand for real estate was practically nonexistent. *See* G. Osborne, G. Nelson & D. Whitman, Real Estate Finance Law § 7.16, at 470-71 (1979) [hereinafter cited as Osborne].

[27] 217 So. 2d 31 (Miss. 1968).

[28] *Id.* at 34.

[29] *Id.* at 35. In *Myles* the security was purchased at foreclosure by an agent of the mortgagee for $3,218, the balance owed by the mortgagor. The chancellor determined the value to have been between $6,500 and $8,000, and determined the bid adequate. The Mississippi Supreme Court affirmed, holding this determination to be consistent with prior cases. *Id.* at 34-35.

[30] 443 So. 2d 861 (Miss. 1983).

[31] *Id.* at 865.

[32] Osborne, *supra* note 26, § 5.21, at 295.

The usual form of a due-on-sale clause is as follows: "Should trustor (mortgagor) sell, convey, transfer, dispose of or further encumber said property, or any part thereof . . . without written consent . . . then beneficiary can declare all sums secured hereby forthwith due and payable." Comment, *Judicial Treatment of the Due on Sale Clause: The Case for Adopting Standards of Reasonableness and Unconscionability*, 27 Stan. L. Rev. 1109, 1110 n.5 (1975).

[33] *See generally* Note, *Property—Nebraska Upholds Validity of Due on Sale Clauses in Real Estate Mortgages*, 14 Creighton L. Rev. 875, 876 (1981) (litigation involving due-on-sale clauses increased during the mid-1960s as lenders attempted to enforce these clauses in an effort to stay abreast of rising interest rates); Bartke & Togoropulos, *Michigan's Looking Glass World of Due-on-Sale Clauses*, 24 Wayne L. Rev. 971, 977-79 (1978) (discussion of frequency of "due-on" suits).

rates sent lenders searching for ways to avoid becoming locked into low interest rate loans.[34]

While most jurisdictions traditionally looked unfavorably on due-on-sale clauses as unreasonable restraints on alienation,[35] the modern trend is toward enforcement of such clauses, prompted by federal legislation in this area.[36] Two lines of cases have developed in jurisdictions that have considered the enforceability of due-on-sale clauses.[37] One approach holds that the lender's desire to refinance its loans at prevailing interest rates was sufficient justification in and of itself for enforcement of the clause.[38] The practical effect of this view is to provide for automatic enforcement of due-on-sale clauses. Other jurisdictions refuse to accept the lender's desire to refinance as a basis for enforcement, and require a showing by the lender of some specific threat to the value of the security caused by the transfer.[39]

Mississippi first addressed the issue of enforceability of a due-on-sale clause in the case of *Sanders v. Hicks*.[40] The Mississippi Supreme Court reasoned that while such clauses were not *per se* invalid,[41] their enforceability depended upon whether "they are reasonable under the circumstances."[42] In *Sanders* the clause at issue had no relation to any threat to the legitimate interests of the mortgagee, and was therefore unenforceable.[43] As a result of the decision in *Sanders*, Mississippi

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[34] *See* OSBORNE, *supra* note 26, § 5.21, at 296. *But see* Hetland, *Real Property and Real Property Security: The Well Being of the Law*, 53 CALIF. L. REV. 151, 170 (1965) (due-on-sale clauses also defended as a means of protecting lenders from conveyances to successive buyers with poor credit ratings who would be more likely to commit waste or impair the value of the security).

[35] *See* ABA Committee on Real Estate Financing, *Enforcement of Due-on-Transfer Clauses*, 13 REAL PROP. PROB. & TR. J. 891, 893 (1978) (restraints on alienation not favored at common law).

[36] *See infra* notes 45, 46 and accompanying text.

[37] *See generally* OSBORNE, *supra* note 26, § 5.23, at 303-04.

[38] *See, e.g.*, Gunther v. White, 489 S.W.2d 529, 531 (Tenn. 1973) (presumption in favor of validity of due-on-sale clause); Mutual Fed. Sav. & Loan Ass'n v. Wisconsin Wire Works, 71 Wis. 2d 531, 239 N.W.2d 20, 24 (1976) (same).

[39] *See, e.g.*, Tucker v. Pulaski Fed. Sav. & Loan Ass'n, 252 Ark. 849, 481 S.W.2d 725, 728-29 (1972) (mortgagor must show that enforcement is justified); Clark v. Lochenmeir, 237 So. 2d 583, 585 (Fla. App. 1970) (same).

[40] 317 So. 2d 61 (Miss. 1975).

[41] *Id.* at 64. *Sanders* involved the breach of an express due-on-sale clause of which the buyer had full knowledge. The court reasoned that such a restraint may be valid depending upon its reasonableness under the circumstances. *Id.*

[42] *Id.*

[43] *Id.* at 63. The *Sanders* court stated that the restriction was totally without merit and emphasized that the beneficaries of the clause did not show any impairment of their security, and did not allege any necessity for enforcing the clause. *Id.*

clearly fell within the group of jurisdictions rejecting automatic enforcement of due-on-sale clauses.[44]

In 1982 Congress passed the Garn-St. Germain Depository Institutions Act,[45] effective October 15, 1982, to establish uniformity in the enforcement of due-on-sale clauses.[46] The Act makes all due-on-sale clauses automatically enforceable and preempts state law.[47] However, subsection (c) of the Act provides for a three-year "window period,"[48] during which there will be a moratorium on enforcement of due-on-sale clauses in jurisdictions which formerly restricted their enforceability.[49]

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[44] *See,* OSBORNE, *supra* note 26, § 5.23, at 305.

[45] Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469, 12 U.S.C. § 1701j-3 (1982) [hereinafter cited as Garn Act].

[46] Subsection 341(b)(1) of the Act provides that "Notwithstanding any provision of the constitution or laws (including the judicial decisions) of any State to the contrary, a lender may, subject to subsection (c) of this section, enter into or enforce a contract containing a due-on-sale clause with respect to a real property loan." 12 U.S.C. § 1701j-3(b)(1). For a comprehensive analysis of the Garn Act, see Geier, *Due-on-Sale Clauses Under the Garn-St. Germain Depository Institutions Act of 1982,* 17 U.S.F.L. REV. 355 (1983).

[47] The Senate found that "a lender's right to enforce a due-on-sale clause, in any loan not subject to window period restrictions, would be governed by the terms of the loan contract . . . ." S. REP. No. 536, 97th Cong., 2nd Sess. 21 (1982), *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 3054, 3075. Congress found that lenders, unable to enforce due-on-sale clauses, charged premiums for new loans to the disadvantage of the new home buyer. Borad & Layden, *Due-on-Sale Law as Preempted by the Garn-St. Germain Act,* 12 REAL EST. L.J. 138, 140 (1983).

[48] Garn Act, 12 U.S.C. § 1701j-3(c)(1) (1982). The operative portion of the statute applying to the window period states:

> In a case of a contract involving a real property loan which was made or assumed, including a transfer of the liened property subject to the real property loan, during the period beginning on the date a State adopted a constitutional provision or statute prohibiting the exercise of due on sale clauses, or the date on which the highest court of such State has rendered a decision (or if the highest court has not so decided, the date on which the next highest appellate court has rendered a decision resulting in a final judgment if such decision applies State-wide) prohibiting such exercise, and ending on October 15, 1982, the provisions of subsection (b) of this section shall apply only in the case of a transfer which occurs on or after the expiration of 3 years after October 15, 1982.

Id. Also, Congress created an exception to the "window period" exception by granting a lender the right to accelerate the loan balance if the new buyer does not meet his customary credit standards. *Id.* § 1701j-3(c)(2).

[49] The window period complicates the implementation of due-on-sale clauses by requiring a careful review of each loan situation. For example, in those states that have retroactively restricted due-on-sale enforcement, the window opens on the date of the decision and closes October 15, 1982, the date of the Act. The same is true in states legislatively restricting enforceability. *See* Borad & Layden, *supra* note 47, at 140-43.

While a number of exceptions to general enforceability are included in the Act,[50] it clearly creates a uniform national approach to due-on-sale clauses and forecloses further inconsistencies in state forums.[51] The Garn Act is intended to promote stability by allowing lenders, no longer faced with uncertainty in the enforcement of due-on-sale clauses, to commit themselves to long-term mortgage agreements and yet retain expectations of refinancing before maturity.[52]

In *Caruthers* the appellee sought to purchase certain property and assume the outstanding mortgage[53] with full knowledge of the due-on-sale clause included therein.[54] Caruthers asserted that *Sanders* imposed restrictions on the enforcement of due-on-sale clauses, and therefore Mississippi was a jurisdiction which fell within the window period of the Garn Act.[55] The supreme court rejected Caruthers' argument, holding that *Sanders* was overruled to the extent that it held due-on-sale clauses unenforceable.[56]

The immediate effect of *Caruthers* is to circumvent the window period exception to the Garn Act, thereby instantly validating all ex-

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[50] Section 341(d)(1)-(9) prohibits a lender on certain residential property from enforcing a due-on-sale clause where (1) a subordinate lien is placed on the property unrelated to transfer; (2) a purchase money security interest for household appliances is created; (3) there is a transfer by devise, descent or operation of law upon death of a joint tenant or tenant by the entirety; (4) leases are created for three years or less and do not include an option to purchase; (5) there is a transfer to a relative upon death of the principal; (6) a transfer to spouse or children is effected; (7) spouse, via settlement, becomes an owner of the property; (8) the borrower remains a beneficiary when property is placed in intervivos trust and the transfer does not relate to transfer of rights of occupancy; or (9) transfers are exempted by the Federal Home Loan Bank Board. *See* 12 U.S.C. § 1701j-3(d)(1-9) (1982).

[51] *See supra* notes 38-39 and accompanying text.

[52] Jurisdictions rejecting automatic enforcement of due-on-sale clauses effectively extinguished long-term financing in the marketplace as lenders were hesitant to become fixed into a "permanent" rate of return in a sometimes wildly fluctuating interest market. Geier, *supra* note 46, at 438-40.

[53] 443 So. 2d at 862. The original owners and mortgagors sold the subject property to Mr. and Mrs. Wilcox, who properly assumed the note with the bank's permission. Mr. and Mrs. Wilcox then sold the property to the Carutherses without the bank's permission. *Id.*

[54] *Id.* The court noted that when the Carutherses purchased the property, they had been fully informed of the implications of the clause by their attorney and real estate agent. *Id.* at 865.

[55] *Id.* at 864. *See supra* notes 47-49 and accompanying text.

[56] 443 So. 2d at 864. The court expressly overruled *Sanders*, reasoning that the case was erroneously decided, and applied its decision retroactively to deprive the Carutherses of the benefit of the window period exception. The court based its reversal of *Sanders* on basic freedom of contract theories. *Id.*

isting due-on-sale clauses in Mississippi. While the Garn Act creates a measure of stability,[57] the effect of the instant decision is questionable. In his dissent, Justice Dan Lee reasoned that *Sanders* should stand as proper precedent until such time as the window period was closed, and that to deprive borrowers and buyers of the three-year period was an inappropriate act of "super-legislation."[58]

Jeffrey D. Rawlings

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[57] *See* Borad & Layden, *supra* note 47, at 439-40 (beneficial effects of Garn Act on marketplace).

[58] 443 So. 2d at 868. Justice Lee stated that *Sanders* was a well-reasoned opinion and should stand as precedent until the Mississippi Legislature acts in the wake of Garn-St. Germain. *Id.* He further stated that the threat to the security should be legitimate and more compelling than some remote economic desire to inflate interest rates. Since Congress had seen fit to abandon any reasonable relation approach, the full three-year period should be available under the Garn Act. *Id.* at 869.

TORTS

The Supreme Court of Mississippi decided sixteen tort cases in 1983. These cases dealt with negligence,[1] malicious prosecution,[2] damages,[3] libel,[4] tortious interference with business relations,[5] Mississippi's version of the "similar locality" rule,[6] wrongful death,[7] and implied

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[1] Ross v. Miller, 441 So. 2d 541, 543-44 (Miss. 1983) (in personal injury suit, jury instruction concerning pedestrain's duty to yield to vehicles is incomplete if it does not cover the driver's duty to pedestrian); Lucas v. Mississippi Housing Authority No. 8, 441 So. 2d 101, 105 (Miss. 1983) (trial court erred in granting jury instruction allowing jury to impute negligence of parent to child); Parmes v. Illinois Central Gulf R.R., 440 So. 2d 261, 268 (Miss. 1983) (in negligence action against railroad, whether witness possessed requisite degree of specialized knowledge within field to testify as an expert rests with discretion of the judge); Hinton v. Hydraulic Pumps, Inc., 437 So. 2d 1007, 1010 (Miss. 1983) (plaintiff entitled to jury instruction that defendant-driver was negligent where driver apparently was turning in plaintiff's lane when collision occurred); Edwards v. Cleveland Foods, Inc., 437 So. 2d 56, 58 (Miss. 1983) (where plaintiff presented evidence that floor was damp, evidence was sufficient to withstand motion for directed verdict on whether a hazard was created and whether employees had learned of condition and taken adequate measures to correct it); City of Jackson v. Locklar, 431 So. 2d 475, 480 (Miss. 1983) (where testimony established that defective manhole had existed for six months prior to accident, city had constructive knowledge of defect and was properly held negligent).

[2] Torabi v. J.C. Penney, Inc., 438 So. 2d 1354, 1356 (Miss. 1983) (plaintiff established prima facie case in malicious prosecution suit when he introduced proof of (1) the institution of a criminal proceeding, (2) termination of proceeding in plaintiff's favor, (3) a reasonable basis upon which jury could find malice, (4) lack of probable cause, and (5) damages); Owens v. Kroger Co., 430 So. 2d 843, 848 (Miss. 1983) (question of probable cause and question of malice in malicious prosecution action is for jury when facts are in dispute and reasonable minds could differ).

[3] Bay Springs Forest Prods., Inc. v. Wade, 435 So. 2d 690, 696 (Miss. 1983) (measure of damages when an innocent purchaser bought converted timber from a willful trespasser is "delivered value" of timber).

[4] Newson v. Henry, 443 So. 2d 817, 824 (Miss. 1983) (when defamation is considered actionable per se, award of punitive damages alone is permissible though no award for actual damages is found or shown); Gulf Publishing Co. v. Lee, 434 So. 2d 687, 695 (Miss. 1983) (for public figure to recover damages for defamation, he must show that publisher knew statement was false or that statements were published with reckless disregard for truth or falsity).

[5] Protective Serv. Life Insur. Co. v. Carter, 445 So. 2d 215, 216 (Miss. 1983) (fraud and misrepresentation are unnecessary to prove tortious interference with business relations in sale of insurance).

[6] Holmes v. Elliott, 443 So. 2d 825, 831 (Miss. 1983) (standard of care involved in an operation is established by the "similar locality" rule, and admission of testimony by an expert unfamiliar with such local standards constitutes reversible error); Hall v. Hilbun,

warranty.[8] Of these, four cases have been selected for commentary.

I. Extension of the Implied Warranty of Construction in a Workmanlike Manner to Remote Purchasers

One of the most important decisions rendered by the Mississippi Supreme Court in 1983 concerning tort law was *Keyes v. Guy Bailey Homes, Inc.*[9] In that case, the court held that the builder-vendor of a home may be liable to a subsequent purchaser for defects in the structure.[10]

Fulgram had purchased a home from Guy Bailey Homes, Inc., the builder-vendor, on August 7, 1975.[11] Fulgram sold the home on June 1, 1979,[12] to Keyes, who discovered a latent defect, a cracked foundation, soon after occupying the house.[13] Keyes brought suit in the Circuit Court for the First Judicial District of Hinds County alleging breach of implied warranty and negligent construction. The circuit court dismissed based upon the absence of privity between the builder-vendor and the subsequent purchaser, Keyes. On appeal, the Mississippi Supreme Court reversed in a split decision.[14] Absence of privity does not preclude actions based upon breach of implied warranty, negligent construction, or strict liability that are brought against the builder-vendor of a house by a subsequent purchaser.[15]

No. 53,784, slip op. (Miss. Nov. 9, 1983) (expert testimony establishing the national standard of care was properly excluded). For a more detailed discussion of this area, *see infra* notes 32-46 and accompanying text.

[7] Arender v. Smith County Hosp., 431 So. 2d 491, 494 (Miss. 1983) (savings statute does not apply to wrongful death actions); *see infra* notes 16-31 and accompanying text.

[8] Keyes v. Guy Bailey Homes, Inc., 439 So. 2d 670, 673 (Miss. 1983) (implied warranty of suitability and workmanship extended to remote purchasers); *see infra* notes 9-15 and accompanying text for a more thorough discussion.

[9] 439 So. 2d 670 (Miss. 1983).

[10] *Id.* at 672-73.

[11] *Id.* at 670.

[12] *Id.*

[13] *Id.* at 671.

[14] *Id.* at 673. Justice Prather wrote for the majority, which included Chief Justice Patterson and Justices Roy Noble Lee, Bowling, Hawkins, Dan M. Lee, and Robertson. Justice Walker, joined by Justice Broom, dissented.

[15] *Id.* at 672-73. For more thorough analyses of *Keyes*, see Note, *Torts—Product Liability—Builder-Vendor Liable to Subsequent Purchaser for Defective Construction of Home*, 53 MISS. L.J. 653 (1983); *Contracts and Commercial Law, 1983 Mississippi Supreme Court Review*, 54 MISS. L.J. 97, 99-102 (1984).

II. Inapplicability of the Savings Statute to Wrongful Death Actions

In *Arender v. Smith County Hospital*,[16] the Mississippi Supreme Court held that the savings statute, which tolls the statute of limitations for those disabled by infancy or unsoundness of mind,[17] does not apply to wrongful death cases.[18]

In December of 1974, Mary Arender, wife of appellant Dewitt Arender and mother of appellants Mary Regina and Dewey, died in the Smith County Hospital.[19] On November 24, 1981, the appellants sued the hospital, a physician, and a nurse.[20] The appellees each obtained dismissal by raising the six-year statute of limitations.[21] On appeal, the appellants argued that while the plaintiff-husband might be barred from suit, it would be unfair to bar recovery by the children because of their parent's failure to initiate timely proceedings.[22]

The *Arender* court construed the savings statute to mean that only those actions specifically mentioned in Chapter I, sections 15-1-1 through 15-1-79 of the Mississippi Code could be tolled by infancy or unsoundness of mind.[23] Because the Wrongful Death Act, a Title 11 statute, is not so mentioned, the court held that the savings statute

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[16] 431 So. 2d 491 (Miss. 1983).

[17] Miss. Code Ann. § 15-1-59 (1972 & Supp. 1983).

[18] 431 So. 2d at 493-94.

[19] *Id.* at 492.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 493.

[23] *Id.* at 492. The supreme court has likewise construed the savings statute in Wolcott v. Wolcott, 184 So. 2d 381 (Miss. 1966), and in Foster v. Yazoo & M.V.R. Co., 72 Miss. 886, 18 So. 380 (1895). In *Wolcott*, Mrs. Wolcott received only $100 through her husband's will. 184 So. 2d at 383. Due to her insanity, the will was not contested until suit was brought by a guardian ad litem after the expiration of the six-month period then provided for the renunciation of wills. The supreme court held that "[t]he general savings statute in favor of those under disabilities, in a separate chapter on limitations of actions, does not apply . . . ." *Id.*

In *Foster*, the plaintiff sought to recover for the wrongful death of his father, allegedly caused by Yazoo & Mississippi Valley Railroad Co. 72 Miss. at 886, 18 So. at 380. The railroad company asserted the statute of limitations as a defense. *Id.*, 18 So. at 380. The plaintiff replied that he was an infant at the time of the alleged wrongful act, that he had not been represented by a guardian, and that his action for wrongful death was not barred because of the savings statute. *Id.* at 887, 18 So. at 381. The supreme court held that the savings statute applied only to actions mentioned in the chapter on "limitation of actions," which did not include the wrongful death statute. *Id.* at 889, 18 So. at 381.

could not apply to wrongful death actions.[24] Further, the court reviewed the wrongful death statute,[25] which provides that "there shall be but one suit for each death."[26] The court held that this limitation exists without exception: where one person, who was of majority when the cause of action accrued is barred by the statute of limitations, then all other parties in the joint action are also barred.[27] The court concluded that this would be true "[e]ven if there had been a savings in favor of the children, there being but a single cause of action . . . ."[28]

The harshness of the *Arender* decision should be apparent. Its victims are innocent children who must suffer the loss of their mother without any possibility of compensation. The savings statute seems to be designed to apply to just such a situation, but since the court has held that it does not,[29] the Mississippi legislature should take prompt action to ensure that it will so apply in the future. However, because the legislature failed to amend the statute following an earlier decision that rendered the same conclusion as *Arender*,[30] and because the legislature recently amended the statute in a manner unrelated to the *Arender* situation,[31] the possibility of prompt legislative action seems unlikely.

III. Medical Malpractice Suits and Mississippi's Modified Locality Rule

Two 1983 Mississippi Supreme Court decisions dealt with the locality rule pertaining to the competence of expert witnesses in medical

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[24] 431 So. 2d at 493. The supreme court also refused to engraft a savings provision on the wrongful death statute. *Id.*

[25] Miss. Code Ann. § 11-7-13 (1972 & Supp. 1983).

[26] *Id.*

[27] 431 So. 2d at 493; *see also* Thornton v. Insurance Co. of North America, 287 So. 2d 262, 266 (Miss. 1973) (when deceased is survived by spouse, child, parent, sister, or brother, there can only be one suit brought for all); Southern Pine Electric Power Ass'n v. Denson, 214 Miss. 397, 414, 57 So. 2d 859, 864 (1952), *sugg. of error overruled*, 214 Miss. 397, 421, 59 So. 2d 75, 76 (1952) (in wrongful death action, suit could be brought in name of personal representative or by deceased's widow for benefit of all entitled to recovery).

[28] 431 So. 2d at 493.

[29] *See Arender*, 431 So. 2d at 492-93; Foster v. Yazoo & M.V.R. Co., 72 Miss. 886, 889, 18 So. 380, 381 (1895).

[30] *See Foster*, 72 Miss. at 889, 18 So. at 381.

[31] Act of July 1, 1983, ch. 482, § 2, 1983 Miss. Laws 496-97 (codified at Miss. Code Ann. § 15-1-59 (Supp. 1983). The statute had provided that the person under disability may bring any of the personal actions mentioned after the disability has been removed; the amendment adds that the disability must have been removed "as provided by law."

malpractice cases. In the first, *Hall v. Hilbun*,[32] in which rehearing is still pending the court held that in order to state a cause of action for breach of the physician's duty of care, the plaintiff must first establish the limits of the local standard of care.[33] The majority relied upon *Dazet v. Bass*,[34] ignoring a more recent case, *King v. Murphy*.[35]

Dazet purported to apply the locality rule, but because no record was made of the evidence that would have been presented by the excluded witness, the scope of the holding is indiscernible.[36] *King v. Murphy* postulated that there are three divisions of the physician's standard of care: the locality or neighborhood rule, the similar locality rule, and the universal (national) rule.[37] The *King* court stated that *Dazet* indicated that while Mississippi had always used the locality or neighborhood rule, and would continue to do so, it would be expanded.[38] Accordingly, *King* changed the standard to "that degree of care, skill and diligence practiced by a reasonably careful, diligent and prudent practitioner in such field of practice or specialty in this state, and for a reasonable distance adjacent to state boundaries."[39] The *King* court

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[32] No. 53,784, slip op. (Miss. Nov. 9, 1983) *petition for reh'g pending.*

[33] *Id.* at 10-12.

[34] 254 So. 2d 183 (Miss. 1971).

[35] 424 So. 2d 547 (Miss. 1982). For a detailed treatment of the *King* decision, see Note, *Locality Rule Requires That Physicians Be Held to Standard of Reasonably Competent Practitioner in Mississippi or Adjacent Area,* 53 Miss. L.J. 353 (1983). Evidently, the court used *Dazet* because it was the controlling precedent at the time of the lower court's decision in the *Hall* case. *See* Hall v. Hilbun, slip op. at 8.

[36] *See* 254 So. 2d at 187-88.

[37] 424 So. 2d at 549.

[38] *Id.* at 549-50.

[39] *Id.* at 550. This "new rule" has engendered considerable confusion. For example, Justice Hawkins, joined by Justice Robertson, in his special concurrence to *Hall*, stated that the court had adopted the "similar locality" rule in *King*. *Hall*, slip op. at 13 (Hawkins, J., specially concurring). Further, Justice Roy Noble Lee, joined in his dissent by Justice Bowling, stated that the lower court excluded expert testimony under the "locality rule" (now "similar locality" rule). *Hall*, slip op. at 2 (Roy Noble Lee, J., dissenting (dissent is separately paginated)).

The basic difference between the similar locality rule and the *King* rule is that while both hold the physician to the standard of care of the community, the similar locality rule emphasizes similarity of communities as to population, size, or number of laboratory facilities, whereas the *King* rule emphasizes geographic proximity. *Compare* Schwab v. Tolley, 345 So. 2d 747, 753 (Fla. Dist. Ct. App. 1977) (standard is skill or diligence of average physician "in the same or a similar community"); McGulpin v. Bessmer, 241 Iowa 1119, 43 N.W.2d 121, 126-28 (1950) (standard is that of competent physician in a similar locality and circumstances rather than geographic proximity; locality is merely one factor); Tallbull v. Whitney, 172 Mont. 326, 564 P.2d 162, 166-67 (1977) ("similar locality" means a location of "similar geographical location, size, and character in a med-

went on to hold that a Florida physician, who had studied and practiced in Massachasetts, Illinois, and New York, failed to meet the requirements of the "new rule."[40] In *Hall*, the court decided that experts from Cleveland, Ohio, failed to meet the standard as well.[41]

In *Holmes v. Elliot*,[42] the other 1983 opinion that addressed the competence of expert witnesses in malpractice cases, the court ruled inadmissible the testimony of an Oklahoma City practitioner who was licensed in both Georgia and Oklahoma.[43] Wrestling again with the scope of the physician's standard of care, Justice Broom wrote for the majority that a mere "understanding" by an expert witness that the national standard and the Mississippi standard should be or were sufficiently similar was not enough to permit the introduction into evidence of the expert's testimony.[44] Though the court seemed to place much emphasis on the fact that the expert witness in question had never practiced in Mississippi,[45] Justice Broom explicitly stated this factor alone would not bar an expert from testifying provided that it was shown that the expert "is knowledgeable of, and familiar with, the statewide standard of care."[46]

It is unfortunate that the court's recent decisions do not further define and delimit the area that is "a reasonable distance adjacent to state boundaries," thus ensuring further litigation of this question. A modification of the standard to the effect that the expert witness must be familiar with the Mississippi standard of care and that he must practice either in Mississippi or in an adjoining state might prove more helpful. In any case, further consideration of this issue by the supreme court would certainly prove beneficial to attorneys litigating medical malpractice cases by enabling them to more effectively select competent expert witnesses and avoid unnecessary expenditures of their clients' funds.

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ical context"); Dickens v. Everhart, 284 N.C. 95, 199 S.E.2d 440, 443 (1973) (standard of care customary in similar communities) *with King*, 424 So. 2d at 550 (standard is degree of care practiced within Mississippi "and for a reasonable distance adjacent to state boundaries").

[40] 424 So. 2d at 550-51.

[41] *Hall*, slip op. at 8-11.

[42] 443 So. 2d 825 (Miss. 1983).

[43] *Id.* at 828-31.

[44] *Id.* at 831.

[45] *Id.* at 829-31.

[46] *Id.* at 831. Justice Broom's remark is in accord with *King v. Murphy*, wherein it was stated that an expert witness "who is knowledgeable of, and familiar with, the statewide standard of care shall not have his testimony excluded on the ground that he does not practice in this state." 424 So. 2d at 550.

IV. Legislative Enactments

The Mississippi Legislature passed several acts affecting tort law in 1983.[47] Two statutes dealt particularly with medical malpractice suits. In the first enactment, the legislature included optometrists and chiropractors with other medical professionals and declared that malpractice actions against all such professionals would be governed by the two-year statute of limitations applicable since 1976.[48] Also, the legislature amended the pleading requirements for medical malpractice suits. Now the complaint need only state that the damages requested are "within the jurisdictional limit of the particular court to which the pleadings are addressed" and is not to request a specific sum.[49]

Daniel Gray Robertson

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[47] Act of Apr. 20, 1983, ch. 534, 1983 Miss. Laws 723 (codified at Miss. Code Ann. §§ 95-7-1 to -13 (Supp. 1983)) (neither one making a donation of food nor a charitable nonprofit organization distributing such food shall be liable for damages in any civil action based on strict liability); Act of Mar. 24, 1983, ch. 394, 1983 Miss. Laws 225 (codified at Miss. Code Ann. § 61-3-83 (Supp. 1983)) (no action in tort shall be maintained against the state, any municipality, airport authority or their officers, agents, or employees for an act committed in the construction, maintenance, enlargement, operation, superintendance, or management of any air navigation facility or airport); Act of Mar. 24, 1983, ch. 394, 1983 Miss. Laws 225 (codified at Miss. Code Ann. § 15-1-35 (Supp. 1983)) (providing that action of "failure to employ" be governed by one year statute of limitations); Act of Mar. 21, 1983, ch. 374, 1983 Miss. Laws 183 (codified at Miss. Code Ann. § 95-5-19 (Supp. 1983)) (one who kills dog chasing or killing poultry or livestock shall not be liable to dog's owner); Act of Mar. 21, 1983, ch. 374, 1983 Miss. Laws 183 (codified at Miss. Code Ann. § 95-5-21 (Supp. 1983)) (owner of dog that kills or injures another's livestock or poultry shall be liable to owner of livestock for any loss suffered including court costs and reasonable attorney's fees); Act of Mar. 21, 1983, ch. 374, 1983 Miss. Laws 183 (codified at Miss. Code Ann. § 95-5-17 (Supp. 1983)) (repealing Miss. Code Ann. § 95-5-17 (1972)).

[48] Act of Apr. 8, 1983, ch. 482, § 1, 1983 Miss. Laws 496 (codified at Miss. Code Ann. § 15-1-36 (Supp. 1983)). Prior to the change made in 1976 by Act of May 25, 1976, ch. 473, 1976 Miss. Laws 784, medical malpractice actions had been governed by a general six-year statute of limitations. *See, e.g.*, Ross v. Hodges, 234 So. 2d 905, 908-09 (Miss. 1970) (action on lack of informed consent is governed by general six-year statute of limitations); Wilder v. St. Joseph Hosp., 225 Miss. 42, 48, 82 So. 2d 651, 653 (1955) (six-year statute of limitations in malpractice action begins to run at time of injury or on date of wrongful act and not at time of discovery).

[49] Act of Mar. 29, 1983, ch. 425, 1983 Miss. Laws 302 (codified at Miss. Code Ann. § 11-1-59 (Supp. 1983)).

RECENT DECISIONS

Commercial Law—Implied Warranty of Merchantability—Sale of Goods by Farmer May Give Rise to Implied Warranty of Merchantability

Plaintiff[1] filed suit for damages against defendant[2] in the County Court of Forrest County for breach of an implied warranty of merchantability[3] under section 75-2-314 of the Mississippi Code.[4] Plaintiff alleged that because cattle sold to him by the defendant

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[1] Plaintiff, J.R. Vince, was a cattle buyer who purchased cattle for resale to feed lots. Vince v. Broome, 443 So. 2d 23, 25 (Miss. 1983).

[2] Defendant, J.D. Broome, was a cattleman with 20 years experience. He operated a cattle feed lot where he fattened cattle for sale to meat packing plants. In this instance, however, he sold cattle to plaintiff through a stockyard or auction barn. *Id.* at 27. The trial court granted a directed verdict to the Southeast Mississippi Livestock Farmers Association, operator of the stockyard and an original defendant in this case. *Id.* at 25. No error was assigned on that action. *Id.* at 25 n.2.

[3] *Id.* at 24. On May 19, 1980, plaintiff purchased from defendant 15 head of cattle through a livestock auction barn. During their transfer to plaintiff's farm and shortly thereafter, the cattle became ill. Five of them suffered substantial weight loss and five others died. *Id.* at 25.

[4] Miss. Code Ann. § 75-2-314(1) (1972). The relevant portion of the statute provides that "[a] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." *Id.* This section formally adopted § 2-314 of the Uniform Commercial Code [hereinafter cited as U.C.C.]. 1966 Miss. Laws ch. 316, § 2-314.

In 1981, the Mississippi Legislature amended Miss. Code Ann. § 75-2-314 (1972) to exclude cattle, hogs, and sheep from implied warranties of merchantability. 1981 Miss. Laws ch. 430, § 1. The amendment states:

> With respect to the sale of cattle, hogs and sheep, there shall be no implied warranty that the cattle, hogs and sheep are free from sickness or disease at the time the sale is consummated, conditioned upon reasonable showing by the seller or his agent that all state and federal regulations pertaining to animal health were complied with.

Miss. Code Ann. § 75-2-314(4) (1972) (amending Miss. Code Ann. § 75-2-314 (1972)). Since the instant action arose prior to July 1, 1981, the date on which the amendment took effect, the Mississippi Supreme Court interpreted the statute as it was written prior to the amendment. *Vince*, 443 So. 2d at 24 n.1.

through a stockyard were sick at the time of the sale, defendant had breached the implied warranty of merchantability of the cattle.[5] Defendant argued that he was not a merchant with respect to this particular sale of cattle through a stockyard; therefore, an implied warranty of merchantability never arose.[6] The county court found for the plaintiff[7] and the defendant appealed.[8] The Circuit Court of Forrest County reversed.[9] On appeal, the Mississippi Supreme Court, *held,* reversed and judgment of the county court reinstated. When a farmer sells goods that he may be said to deal in, he is a merchant with respect to those goods and an implied warranty of merchantability will arise from their sale. *Vince v. Broome,* 443 So. 2d 23 (Miss. 1983).

In the Middle Ages, mercantile courts developed and administered a special body of law called the "law merchant"[10] and applied it only to the dealings of itinerant merchants and peddlers.[11] Although the law merchant eventually became a part of the common law of England[12] and of American jurisdictions,[13] the courts in this country did not apply different rules to transactions on the basis of a party's status as a

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[5] 443 So. 2d at 25. According to the veterinarian who treated the cattle, the animals suffered from a toxic condition caused by overeating. Defendant admitted that he inadvertently allowed a number of his cattle to roam into the feed lot and overeat. *Id.* He denied, however, that he knew the cows were sick at the time of sale. *Id.* at 26 n.4.

[6] *Id.* at 27. Defendant argued that he was not a merchant because (1) his cattle operation occupied only 15% to 20% of his time, and (2) the vast majority of the cattle operation was directed toward raising cattle for slaughter, not for resale through a stockyard. *Id.* at 27. He urged that because he sold only what he raised and had no particular knowledge of the type of sales transaction involved in the instant case, he was not a merchant as contemplated under MISS. CODE ANN. § 75-2-314 (1972). 443 So. 2d at 27. Defendant testified that he did not give an express warranty. *Id.* at 26 n.4.

[7] 443 So. 2d at 24. The jury returned a verdict for the plaintiff in the sum of $2,640.23. *Id.*

[8] *Id.*

[9] *Id.*

[10] F. WHITNEY, THE LAW OF MODERN COMMERCIAL PRACTICES § 111 (1958).

[11] *Id.* Eventually, the English courts applied the law merchant to all commercial transactions. 1 A. SQUILLANTE & J. FONSECA, THE LAW OF MODERN COMMERCIAL PRACTICES § 1:10 (rev. ed. 1980).

[12] 1 STATE OF NEW YORK REPORT OF THE LAW REVISION COMMISSION FOR 1954 AND RECORD OF HEARINGS ON THE UNIFORM COMMERCIAL CODE 107 (1954 & reprint ed. 1980) [hereinafter cited as RECORD OF HEARINGS]. *See also* A. SQUILLANTE & J. FONSECA, *supra* note 11, § 1:10 (special law merchant courts merged with common law courts).

[13] *See, e.g.,* Scott v. City of Tampa, 158 Fla. 712, 30 So. 2d 300, 302 (1947) ("law merchant" was part of common law of England, and as such was adopted by our constitution); Bank of Conway v. Stary, 51 N.D. 399, 200 N.W. 505, 508 (1924) ("law merchant" is system of equity designed to regulate dealings of merchants in all commercial countries).

merchant or a non-merchant.[14] Prior to the adoption of the Uniform Commercial Code by the states, judicial decisions tended to give the term merchant its ordinary meaning: one who bought and sold goods as a dealer.[15] When the drafters of the Uniform Commercial Code formulated Article 2 on sales, however, they attached special significance to the term merchant[16] by creating provisions within the Code that centered on its application.[17] Comment 2 to section 2-104 of the Uniform Commercial Code explained that the special provisions of the Code as

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[14] Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 572 (1950). Cases were decided based on the type of transaction involved, not on the status of the parties as merchants or nonmerchants. *Id.*

[15] *See, e.g.*, Seeley v. Helvering, 77 F.2d 323, 324 (2d Cir. 1935) (merchant is middleman in distribution of goods); Magnolia Petroleum Co. v. City of Broken Bow, 184 Okla. 362, 87 P.2d 319, 321 (1939) (merchant is one who buys to sell or buys and sells goods in a shop or store); Commonwealth v. Wytheville Knitting Mills Employees Welfare Ass'n, 195 Va. 663, 79 S.E.2d 621, 624 (1954) (merchant for tax purposes is dealer in goods, wares, and merchandise).

[16] U.C.C. § 2-104(1) (1978). The UCC defines merchant as follows:

> "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction *or* to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

U.C.C. § 2-104(1) (1978) (emphasis added).

The use of the term "or" indicates that if a seller fits into any one of the definitional categories he will be considered a merchant. *See generally* Newell, *The Merchant of Article 2*, 7 VAL. U.L. REV. 307, 316 (1973) (any person can be a merchant if he satisfies one of nine possible definitions in U.C.C. § 2-104).

U.C.C. § 2-104 comment 2 (1978) explained that the term "merchant" as used in the UCC originated in the "law merchant" concept of the professional in business. *Id. See supra* notes 10-12 and accompanying text. Nevertheless, the significance ascribed to "merchant" varied from drafter to drafter. On the one hand, Karl Llewellyn, a principal drafter of Article 2, stated that "[t]he whole law . . . rest[s] on a vital need for distinguishing merchants [as professionals,] from housewives, and from farmers, and from mere lawyers." RECORD OF HEARINGS, *supra* note 12, at 107-08. On the other hand, Sonia Mentschikoff, another chief drafter, thought that the emphasis should be placed on the term "practices," thus a person familiar with a set of business practices is a merchant, whether or not he had previously dealt with the exact goods involved. *Hearing Before Enlarged Editorial Board*, 6 BUS. LAW. 164, 183 (1951). At least some of the drafters considered prudent business practices to mean the timely answering of mail. *Id.* This broad interpretation of "practices" suggested that the term "merchant" could apply to a wider spectrum of persons than Professor Llewellyn may have anticipated. *See* U.C.C. § 2-104 comment 2 (1978) (for purposes of U.C.C. §§ 2-201(2), -205, -207, and -209, almost everyone in business would be deemed a merchant).

[17] *See* U.C.C. § 2-104 comment 2 (1978) (explaining special provisions applying to merchants).

to merchants were of three varieties. First, there are those sections that contemplate "merchants" in ordinary business matters, and these sections define the term with reference to whether or not a person has familiarity with normal business practices.[18] Second, there is the section on the implied warranty of merchantability, and this section restricts the term "merchant" so that it only refers to a person selling particular goods.[19] Third, there are the sections dealing with standards—such as good faith—that are required of merchants, and these sections define the term "merchant" with either the familiarity-with-normal-business-practices standard or the selling-particular-goods standard.[20] By formulating special provisions for merchants, the drafters indicated that in commercial dealings the Uniform Commercial Code would generally hold merchants to higher standards than nonmerchants.[21]

Consideration of whether a farmer was a merchant has arisen most frequently in cases involving Uniform Commercial Code section 2-201, the statute of frauds;[22] section 2-207, additional terms;[23] and section 2-

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[18] U.C.C. § 2-104 comment 2 (1978). The sections in which a merchant would be anyone familiar with ordinary business practices were § 2-201(2) (statute of frauds), § 2-205 (firm offers), § 2-207 (additional terms), and § 2-209 (modification). Defining merchants by knowledge of business practices would lead to the result that "almost every person in business would be deemed to be a 'merchant' " while acting in his mercantile capacity. U.C.C. § 2-104 comment 2 (1978). *See infra* notes 22-23 (explaining this type of special merchant provision).

[19] U.C.C. § 2-104 comment 2 (1978). An implied warranty of merchantability was to follow goods sold by a merchant, but the implied warranty arose only "if the seller is a merchant with respect to goods of that kind." U.C.C. § 2-314(1) (1978). The warranty would not arise if the seller was merely in business or familiar with business practices. U.C.C. § 2-104 comment 2 (1978).

[20] U.C.C. § 2-104 comment 2 (1978). These sections, which carry the broadest possibilities for finding merchant status, include § 2-103(1)(b) (good faith of merchant); sections on the merchant buyer's responsibility to follow instructions of the seller; the provision for risk of loss; and the provision on adequate assurance of performance. U.C.C. § 2-104 comment 2 (1978).

[21] 1 W. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-104:01 (1982). *See also* Squillante, *Is He or Isn't He a Merchant?—The Farmer* (pt. 1), 82 COM. L.J. 155, 156 (1977) (farmer should be held to higher standard of care under UCC definition of merchant). No body of law prior to the UCC, not even the Uniform Sales Act, made such a substantial distinction between merchants and nonmerchants. Williston, *supra* note 14 at 572.

[22] U.C.C. § 2-201(1) (1978) provided that "a contract for the sale of goods for the price of $500 or more" must be evidenced by a writing signed by the party to be charged in order to be enforceable. However, U.C.C. § 2-201(2) (1978) made the following exception for merchants:

> Between merchants if within a reasonable time a writing in confirmation

314, the implied warranty of merchantability.[24] The first case to con-

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of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.

Id.

The effect of U.C.C. § 2-201(2) (1978) was to eliminate the statute of frauds as a defense by a merchant, even though the merchant had signed no contract. U.C.C. § 2-201 comment 3 (1978). The crucial question for farmers was whether they were merchants for purposes of this section. U.C.C. § 2-104 comment 2 (1978) provided that anyone familiar with business practices could be a merchant for purposes of the statute of frauds. *See supra* note 18 (explaining U.C.C. § 2-104 comment 2 (1978)). *Compare* Continental Grain Co. v. Martin, 536 F.2d 592, 594 (5th Cir. 1976)(farmer was merchant), *cert. denied,* 429 U.S. 1024 (1976); *and* Sierens v. Clausen, 60 Ill. 2d 585, 328 N.E.2d 559, 561 (1975) (same); *and* Nelson v. Union Equity Coop. Exch., 548 S.W.2d 352, 358 (Tex. 1977) (same); *with* Fear Ranches, Inc. v. Berry, 470 F.2d 905, 907 (10th Cir. 1972) (farmer not merchant); *and* Pierson v. Arnst, 534 F. Supp. 360, 362 (D. Mont. 1982) (same); *and* Loeb & Co. v. Schreiner, 294 Ala. 722, 321 So. 2d 199, 202 (1975) (same); *and* Cook Grains, Inc. v. Fallis, 239 Ark. 962, 395 S.W.2d 555, 556-57 (1965) (same); *and* Decatur Coop. Ass'n v. Urban, 219 Kan. 171, 547 P.2d 323, 328-29 (1976) (farmer not merchant but estopped from denying oral contracts); *and* Terminal Grain v. Freeman, 270 N.W.2d 806, 812 (S.D. 1978) (farmer not merchant); *and* Lish v. Compton, 547 P.2d 223, 226 (Utah 1976) (same).

The typical case arose when a farmer promised to sell his produce at a certain price on a certain future date by entering a "futures" contract with a grain company or broker. Generally, the buyer sent the farmer a confirming memorandum which, of course, was not signed by the farmer. If the market price of the crop rose, the farmer could try to assert the statute of frauds to invalidate the contract, but if the farmer were found to be a merchant, he would be bound by the contract. Note, *The Farmer as Merchant Under the U.C.C.*, 53 N.D.L. Rev. 587, 594 (1977). *See, e.g.*, Continental Grain Co. v. Harbach, 400 F. Supp. 695, 698-99 (N.D. Ill. 1975) (soybean farmer breached oral futures contract after dramatic price increase); Gerner v. Vasby, 75 Wis. 2d 660, 250 N.W.2d 319, 323 (1977) (corn farmer breached futures contract when price of corn doubled); *see also* Allenberg Cotton Co. v. Pittman, 419 U.S. 20, 26-29 (1974) (farmers' refusing to honor forward contracts can damage commodities market). See *The Farmer in the Sales Article of the U.C.C.: "Merchant" or "Tiller of the Soil"?*, 1976 S. Ill. U.L.J. 237, 239-41 (the economic impact of the use (or abuse) of future contracts).

[23] U.C.C. § 2-207(2) (1978) provides a special mechanism whereby additional terms to a contract may become part of the contract if merchants are involved. See *supra* note 18 for an explanation of the scope of the term "merchant" in this context. *See generally* Ohio Grain Co. v. Swisshelm, 40 Ohio App. 2d 203, 318 N.E.2d 428, 428-29 (1973) (experienced farmer was merchant and could send written confirmation containing additional terms that would hold seller to the terms).

[24] *See, e.g.*, Fear Ranches, Inc. v. Berry, 470 F.2d 905, 907 (10th Cir. 1972) (no implied warranty of merchantability when cattle farmer not merchant); Musil v. Hendrich, 6 Kan. App. 2d 1966, 627 P.2d 367, 373 (1981) (dealer in feeder pigs was merchant and subject to implied warranty of merchantability); Bennett v. Jansma, 329 N.W.2d 134, 136 (S.D. 1983) (regular seller of cattle considered merchant causing warranty of merchantability to arise); *see supra* note 19 and accompanying text (explaining breadth

sider whether a farmer was a merchant under the Uniform Commercial Code concerned the typical alleged oral futures contract.[25] In *Cook Grains, Inc. v. Fallis*[26] the defendant farmer allegedly contracted to sell 5,000 bushels of soybeans to the plaintiff.[27] The Arkansas Supreme Court reasoned that although the defendant sold crops he raised, he was not a merchant, because he was not a dealer in goods of the kind, and he did not hold himself out as having knowledge or skills peculiar to the practices or goods involved.[28] The court, by viewing the farmer as "one devoted to tillage of the soil"[29] and the merchant as a professional, created two mutually exclusive groups.[30]

The next major decision, *Fear Ranches, Inc. v. Berry*,[31] shifted the focus of the inquiry from the meanings of "farmer" and "merchant" to the definition of "goods of the kind" under Uniform Commercial Code

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of definition of term "merchant" for purposes of implied warranty).

See Note, *Uniform Commercial Code—Is the Farmer a "Merchant"?* 28 BAYLOR L. REV. 715, 716-17 (1976)(discussing cases involving the merchant status of farmers).

[25] *See supra* note 22.

[26] 239 Ark. 962, 395 S.W.2d 555 (1965).

[27] 395 S.W.2d at 555. Plaintiff, Cook Grains, Inc., alleged that its agent entered into a valid oral contract with defendant for the sale of defendant's soybeans. *Id.* Plaintiff sent defendant a signed confirming memorandum which the defendant did not sign or return. The defendant later refused to deliver the beans and raised the statute of frauds as his defense. *Id.* at 556.

[28] *Id.* at 556. The court reasoned that since farmers were not explicitly included in the definition of merchant under U.C.C. § 2-104, the Arkansas General Assembly did not intend for the statute to regulate the commercial activities of farmers. *Cook Grains, Inc.*, 395 S.W.2d at 557. Furthermore, by making the distinction between farmers and "professional traders," the court indicated that a farmer "merely trying to sell the commodities he has raised" was no more than the casual buyer or seller described in U.C.C. § 2-104, comment 1. 395 S.W.2d at 557. *See* Loeb & Co. v. Schreiner, 294 Ala. 722, 321 So. 2d 199, 202 (1975) (farmer selling cotton he raised was casual seller); Terminal Grain v. Freeman, 270 N.W.2d 806, 812 (S.D. 1978) (farmer who sold only crops he raised for cash was not merchant). *But see* Sierens v. Clausen, 60 Ill. 2d 585, 328 N.E.2d 559, 561 (1975) (farmer who sold his crops through cash sales and future contracts was merchant); Sebasty v. Perschke, 404 N.E.2d 1200, 1202 (Ind. Ct. App. 1980) (farmer who grew crops for sole purpose of selling them was merchant).

[29] 395 S.W.2d at 556 (quoting Sohner v. Mason, 136 Cal. App. 2d 449, 288 P.2d 616, 617 (1955)).

[30] 395 S.W.2d at 556-57. The court said that it had found no case holding that the term "farmer" could be construed to mean a merchant. *Id. But cf.* Campbell v. Yokel, 20 Ill. App. 3d 702, 313 N.E.2d 628, 630 (1974) (farmer could be considered a merchant in some instances). *See generally* Squillante, *Is He or Isn't He a Merchant?—The Farmer* (pt. 3), 82 COM. L.J. 430, 431 (1977) (lack of synonymity between farmer and merchant does not result in mutually exclusive terms).

[31] 470 F.2d 905 (10th Cir. 1972).

section 2-314.[32] The Tenth Circuit applied New Mexico law in *Fear Ranches* and held that whether a cattle farmer was a merchant under section 2-314 depended on the familiarity of the farmer with the particular type of cattle or "goods" involved.[33] The court held that since Berry previously had sold cattle only to packers, and since the sale in question was to another rancher and involved a classification of livestock with which Berry was not familiar, he was not a merchant with respect to goods of that kind.[34] Thus, the court considered the degree of the farmer's experience with the particular category of goods being sold to be an important factor in determining his merchant status. The notion that a farmer's experience with the goods involved could be a crucial consideration in determining his merchant status was expanded by the Illinois Supreme Court in *Sierens v. Clausen*.[35] In that case, the court examined the number of years the farmer had farmed and sold his crops to grain elevators and the method by which he sold his crops.[36] Having taken these factors into account, the court concluded

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[32] U.C.C. § 2-314(1) (1978). *See supra* notes 4 and 19. There are cases holding sellers of farm goods to be merchants subject to the implied warranty of merchantability provision. *See, e.g.*, Martineau v. Walker, 97 Idaho 246, 542 P.2d 1165, 1166 (1975) (cattle ranchers assumed to be merchants); Musil v. Hendrich, 6 Kan. App. 2d 196, 627 P.2d 367, 372-73 (1981) (experienced seller of feeder pigs was merchant); Bennett v. Jansma, 329 N.W.2d 134, 136 (S.D. 1983) (cattle salesman was merchant).

[33] *Fear Ranches, Inc.*, 470 F.2d at 907. Defendant Berry sold cattle, which were later diagnosed as having the highly contagious Bang's Disease, to a rancher, Perschbacker. Plaintiff Fear Ranches subsequently bought them from Perschbacker, who was also a defendant. *Id.* at 906.

[34] *Id.* at 907. According to the court, the term "cattle" included several types of goods, such as steers, heifers, and feeders. Since "cattle" was thus not a particular category of goods, Berry was not a merchant. *Id. See supra* note 19 (explaining term merchant as applied in § 2-314). Nonetheless, the court found Perschbacker to be a merchant under U.C.C. § 2-314, because he was a trader and was therefore familiar with many different types of cattle. 470 F.2d at 907.

[35] 60 Ill. 2d 585, 328 N.E.2d 559 (1975). The court relied on a lower court's decision in Campbell v. Yokel, 20 Ill. App. 702, 313 N.E.2d 628, 630 (1974). *See generally*, Dolan, *The Merchant Class of Article 2: Farmers, Doctors, and Others*, 1977 WASH. U.L.Q. 1, 16 (examination of the reasoning in *Campbell*).

[36] 328 N.E.2d at 561. Clausen had farmed for 34 years, had approximately 180 acres of corn and 150 acres of soybeans under cultivation, and had sold his crops to grain elevators both for cash and through futures contracts for at least five years. *Id.* Other courts have considered similar factors important. *See, e.g.*, Continental Grain Co. v. Harbach, 400 F. Supp. 695, 698 (N.D. Ill. 1975) (defendant had over 30 years farming experience, had negotiated forward contracts, and was familiar with the Chicago Board of Trade); Musil v. Hendrich, 6 Kan. App. 2d 196, 627 P.2d 367, 373 (1981) (hog farmer in business for over 30 years, who sold from 50 to 100 pigs per month, was merchant); Ohio Grain Co. v. Swisshelm, 40 Ohio App. 2d 203, 318 N.E.2d 428, 430 (1973) (familiarity with the corn futures market was sufficient to impose merchant status on farmer

that Clausen, a soybean farmer,[37] was a merchant at the time of the sale and was, therefore, barred from asserting the statute of frauds as a defense to a sales confirmation that he had not signed.[38]

A few months after *Sierens*, the Alabama Supreme Court decided *Loeb & Co. v. Schreiner*[39] which followed the ten-year-old decision of *Cook Grains, Inc.*[40] The court rejected the assertion that Schreiner's farming and selling experience qualified him as a merchant.[41] The court, in looking at each of the three criteria which could cause a seller to be deemed a merchant under Uniform Commercial Code section 2-104(1),[42] held that defendant did not become a dealer in cotton merely by selling his own crop; the court implied that, in addition, he must have sold the crop of others.[43] Furthermore, the court concluded that although a seller might assert familiarity with, or skills particular to, the goods or practices involved, he would not be a merchant unless "by his occupation" he held himself out as having those skills.[44] Another

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selling soybeans by similar method); Nelson v. Union Equity Coop. Exch., 548 S.W.2d 352, 356 (Tex. 1977) (reasonable person could expect wheat farmer to be familiar with the various grades and qualities of wheat). *But see* Loeb & Co. v. Schreiner, 294 Ala. 722, 321 So. 2d 199, 200 (1975) (cotton farmer of 22 years, who sold cotton to company for past five years, not merchant).

[37] Plaintiffs, Sierens and Thompson, alleged that defendant, Clausen, orally agreed to sell them 3,500 bushels of soybeans to be delivered in the future. Plaintiffs had provided the defendant with a written confirmation of the agreement. *Sierens*, 328 N.E.2d at 559. Clausen failed to deliver the beans, and plaintiffs sued. *Id.* at 560.

[38] *Id.* at 561. *See supra* notes 18, 19 and accompanying text for an explanation of the difference in the scope of the term "merchant" as applied in the statute of frauds and as applied in the warranty of merchantability.

[39] 294 Ala. 722, 321 So. 2d 199 (1975).

[40] 321 So. 2d at 201.

[41] *Id.* at 202. Defendant, Schreiner, was a cotton farmer for more than 10 years, who made an oral contract with plaintiff, Loeb & Co., a cotton marketing company, to sell his cotton at a future date. Defendant had sold cotton to plaintiff for four or five years. The plaintiff mailed the defendant a confirming memorandum, which defendant neither signed nor returned. When plaintiff inquired about the agreement four months later, after the price of cotton had almost doubled, defendant said he did not intend to abide by the agreement. *Id.* at 200.

[42] *Id.* at 201-02. *See supra* notes 17-20 and accompanying text (detailing the three types of merchant-oriented provisions); *see also* Musil v. Hendrich, 6 Kan. App. 2d 196, 627 P.2d 367, 372-73 (1981) (applied U.C.C. § 2-104 three-pronged definition of merchant).

[43] 321 So. 2d at 202. The court said that "[t]here is not one shred of evidence that appellee ever sold anyone's cotton but his own." *Id.*

[44] *Id.* The court relied almost entirely on U.C.C. § 2-104 comment 1, which states that Article 2 applies to transactions between professionals and not to a casual or inexperienced seller or buyer. The court held that a farmer did not, "solely *by his occupation* hold himself out as being a professional cotton merchant." 321 So. 2d at 202. *Compare*

state supreme court decision,[45] part of the progeny of *Cook Grains, Inc.*, never referred to the statutory definition of merchant, but instead relied on the *American Heritage Dictionary*.[46] The Utah Supreme Court, in *Lish v. Compton*,[47] held that a farmer of twenty-five years duration, experienced in negotiating contracts for the sale of his hay and grain, was not a merchant.[48] The court noted that a person who sold products he made or raised with such regularity that sales represented a substantial portion of his occupation would be a merchant. This holding implies that one sale a year was insufficient.[49]

The Texas Supreme Court considered a similar factual situation, but broke away from *Cook Grains, Inc.* in *Nelson v. Union Equity Cooperative Exchange*.[50] The court found that a wheat farmer who sold his own crop annually was a merchant within the meaning of Uniform Commercial Code section 2-104.[51] Nelson, the court found, by his occupation as a farmer, held himself out as having knowledge of the goods involved in the transaction.[52] Futhermore, despite the fact that Nelson

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Decatur Coop. Ass'n v. Urban, 219 Kan. 171, 547 P.2d 323, 328 (1976) (UCC drafters equated merchants with professionals) *with* Ohio Grain Co. v. Swisshelm, 40 Ohio App. 2d 203, 318 N.E.2d 428, 430 (1973) (only as professional agribusinessmen can farmers survive in today's farm economy).

[45] Lish v. Compton, 547 P.2d 223 (Utah 1976).

[46] *Id.* at 226 n.3.

[47] 547 P.2d 223 (Utah 1976). Lish and Compton discussed the sale of Compton's wheat crop over the phone. The terms, which Lish claimed were agreed upon, were that Lish would pay $3.30 per bushel for approximately 15,000 bushels of wheat. Lish then mailed a confirmation to Compton. *Id.* at 224.

[48] *Id.* at 225. *Cf.* Azevedo v. Minister, 86 Nev. 576, 471 P.2d 661, 664 (1970) (hay ranchers conceded they were merchants).

[49] 547 P.2d at 226. *But see* Nelson v. Union Equity Coop. Exch. 548 S.W.2d 352, 355 (Tex. 1977) (farmer who sold wheat once a year was a professional merchant). *See generally* Comment, *Lish v. Compton—Is a Farmer a Merchant Under the UCC?* 1976 UTAH L. REV. 558 (possible effects of *Lish* decision).

[50] 548 S.W.2d 352 (Tex. 1977).

[51] *Id.* at 356. Union Equity sued Nelson for breach of an alleged wheat forward contract. Nelson had refused to deliver, and Union Equity had to buy other wheat at a substantially higher price. *Id.* at 353-54. The court began its analysis with the observation that the court was bound to apply the definitions of "merchant" as expressly set out in TEX. BUS. & COM. CODE ANN. § 2-104(a) (Vernon 1968). 548 S.W.2d at 355. *See supra* note 16. *But see* Lish v. Compton, 547 P.2d 223, 226 (Utah 1976) (dictionary defined "merchant" as one whose occupation was buying and selling); Cook Grains, Inc. v. Fallis, 239 Ark. 952, 395 S.W.2d 555, 557 (1965) ("merchant" should be given its plain and ordinary meaning). *See generally* McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795, 801-28 (1978)(review of judicial methodologies for interpreting "merchant").

[52] 548 S.W.2d at 356. The court's analysis rested on the expectations of the contracting parties. Since a reasonable buyer could expect an experienced wheat farmer to

sold his wheat only once a year, that sale was an integral part of Nelson's occupation.[53] Viewing the statutory definition of "merchant" in conjunction with all the official comments, the court decided that the broad language suggested that the drafters intended Uniform Commercial Code section 2-104 to apply to all but the most casual buyers and sellers.[54] This interpretation did not impose an unreasonable burden on the farmer, the court reasoned, because all he was required to do was read his mail and respond to a confirming memorandum within ten days.[55]

Most recently, in *Bennett v. Jansma*,[56] the South Dakota Supreme Court found that a person who regularly sold cattle through a livestock auction barn was a merchant.[57] In contrast to an earlier decision by this same state court holding that a wheat farmer was not a

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be knowledgeable about the various grades and types of wheat he raised, and since Nelson necessarily had to discuss these particulars with potential buyers, then Nelson held himself out as having that knowledge. Therefore, Nelson satisfied the portion of U.C.C. § 2-104 that defines a merchant as a person who by his occupation held himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction. 548 S.W.2d at 356.

The *Nelson* court was cognizant of the decision in Lish v. Compton, 547 P.2d 223, 226 (Utah 1976), which held that a farmer who only sold what he raised was not a merchant. *Lish* held that the term "merchant" should be applied according to its "basic dictionary definition." *Id.* at 226 & n.3. The court in *Nelson*, however, pointed out that "we are not here dealing with the dictionary definition of 'merchant,'" but with the express statutory definition of that term. 548 S.W.2d at 355.

[53] 548 S.W.2d at 356.

[54] *Nelson*, 548 S.W.2d at 357. There were protections for inexperienced farmers, however, within the UCC itself. U.C.C. § 1-203 (1978) states that "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." U.C.C. § 2-103 (1978) defines "good faith" in the case of a merchant as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." *See* Oloffson v. Coomer, 11 Ill. App. 3d 918, 296 N.E.2d 871, 875 (1973) (commercial grain dealer must exercise good faith in dealings with farmer).

[55] 548 S.W.2d at 357-58. *See* Campbell v. Yokel, 20 Ill. App. 3d 702, 313 N.E.2d 628, 630 (1974) (small burden of answering mail lessened possibility of fraud); Rush Johnson Farms, Inc. v. Missouri Farmers Ass'n, 555 S.W.2d 61, 65 (Mo. Ct. App. 1977) (burden of answering mail not too great for operator of large farm); U.C.C. § 2-104 comment 2 (1978) (answering mail is general business practice). *See generally* Note, *supra* note 22, at 604 (public policy and the merchant status of farmers).

[56] 329 N.W.2d 134 (S.D. 1983).

[57] *Id.* at 136. Jansma, a cattle salesman, sold to Bennett cattle which subsequently became sick. Although Bennett notified the auctioneer of the cattle's condition, he did not contact Jansma until four and one-half months later. *Id.* at 137. Even though the court held that Jansma was a merchant for purposes of the warranty of merchantability, Bennett lost the case for failing to give reasonable notice of the claimed breach of warranty as required by U.C.C. §§ 1-204(2), 2-607(3). 329 N.W.2d at 136-38.

merchant,[58] *Bennett* held that Jansma, the cattle salesman, possessed particular knowledge of cattle transactions[59] and was consequently a merchant. The court noted that under Uniform Commercial Code section 2-314, a warranty of merchantability arose if the seller was a merchant with respect to the type of goods involved.[60] Applying the definition of "merchant" in Uniform Commercial Code section 2-104,[61] the court found that because Jansma "regularly deal[t] in the buying and selling of cattle," he was a merchant for purposes of the warranty of merchantability.[62]

In the instant case, the court found that because many farmers regularly engage in commercial transactions and are considered agribusiness persons, farmers may be merchants if they fall within the broad ambit of section 75-2-104 of the Mississippi Code defining "merchants."[63] Additionally, the court noted that by amending section 75-2-314 of the Mississippi Code to exclude the sale of farm animals from the implied warranty of merchantability,[64] the legislature had inferentially acknowledged that farmers could be merchants under section 75-2-104 of the Code, which does not expressly exclude farmers from such classification.[65] Furthermore, the court held that since farmers may be merchants, an implied warranty of merchantability will arise if a farmer sells goods and is a merchant with respect to goods of that kind.[66] The court concluded that since the defendant was an experienced cattleman, and since he had expertise peculiar to the sale of cattle, then he was a merchant and an implied warranty of

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[58] Terminal Grain Corp. v. Freeman, 270 N.W.2d 806 (S.D. 1978). *Terminal Grain Corp.* held that an average farmer with no particular experience in buying or selling was not a merchant for purposes of the UCC statute of frauds. *Id.* at 812.

[59] *Bennett*, 329 N.W.2d at 136. By rendering these two conflicting decisions, the court demonstrated that it would decide on a case-by-case basis whether a farmer was a merchant. *Id.* Other courts have done the same, although different courts require varying degrees of expertise of the farmer. *See, e.g.*, Rush Johnson Farms, Inc. v. Missouri Farmers Ass'n, 555 S.W.2d 61, 64 (Mo. Ct. App. 1977) (farmer familiar with operation of grain elevators and price negotiations was merchant); Ohio Grain v. Swisshelm, 40 Ohio App. 2d 203, 318 N.E.2d 428, 430 (1973) (because of familiarity with farm market, livestock farmer was merchant with respect to sale of surplus grain).

[60] 329 N.W.2d at 136. *See supra* notes 4, 19 and accompanying text (discussion of "merchant" under U.C.C. § 2-314(1) (1978)).

[61] *See supra* notes 17-20 and accompanying text.

[62] *Bennett*, 329 N.W.2d at 136.

[63] Vince v. Broome, 443 So. 2d 23, 25 (1983).

[64] *See supra* note 4.

[65] 443 So. 2d at 25.

[66] *Id.* at 26.

merchantability arose from his sale of cattle to the plaintiff.[67]

In dissent, Justice Broom[68] noted that farmers are not mentioned or included in any definition of "merchants" in the Uniform Commercial Code, and he argued that farmers, not being merchants, should not be governed by a *commercial* code.[69] Justice Broom reasoned that while farmers may have expertise in the production of what they sell, their special knowledge does not extend to buying and selling goods in the marketplace. He would hold that a farmer selling what he raises is not a dealer.[70]

An analysis of the merchant status of a farmer under the Uniform Commercial Code is more properly an analysis of the farmer's status under a particular section of the Code, since different conclusions can result under different sections.[71] The basic difference is that, under sections of the Uniform Commercial Code governing merchants in routine business transactions, virtually anyone in business is a merchant as contemplated;[72] whereas under the section creating an implied warranty of merchantability in sales by merchants, only one who deals in goods of the particular kind is a merchant as contemplated.[73]

The instant court embarked on a proper review of the question by first considering the definition of "merchant" in Uniform Commercial Code section 2-104 and then reaching the obvious conclusion that a farmer can be a merchant.[74] Having crossed that threshold, the court then studied the particular section involved—section 2-314—not to determine whether the farmer was a mere merchant, but to decide whether he was a merchant with respect to goods of the kind involved. It should be noted that the former would be the question under a sec-

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[67] *Id.* at 27-28.

[68] Presiding Justice Walker, Justice Roy Noble Lee, and Justice Dan M. Lee joined in the dissent.

[69] 443 So. 2d at 28-29. Justice Broom found it unreasonable to place the burden of responsibility for understanding commercial law on farmers. *Id.* at 29.

[70] *Id.* Justice Broom cited Pierson v. Arnst, 534 F. Supp. 360, 362 (D. Mont. 1982), which explained his view that the drafters of the UCC intended the term "merchant" to mean one familiar with the customs of the *marketplace*—not a mere farmer. 443 So. 2d at 29.

[71] *See supra* notes 18-20 and accompanying text.

[72] *See supra* notes 18, 20. For example, under U.C.C. § 2-201, the statute of frauds, a person would be a merchant if he met any of the three criteria in U.C.C. § 2-104, and almost any person in business would meet at least one of the criteria.

[73] *See supra* note 19.

[74] *Vince*, 443 So. 2d at 25. The court found that nothing excluded a farmer from merchant status if the facts fell within the definition of merchant in U.C.C. § 2-104. 443 So. 2d at 25.

tion governing routine business transactions. After synthesizing such factors as the size, extent, and duration of the cattle farm involved, the court in *Vince* correctly held the farmer to be a professional cattle dealer.[75]

For courts and practitioners alike, the continued challenge will be deciding what factors to weigh in adjudicating the merchant status of farmers. Since the court in *Vince* held that by his occupation a farmer *may be* a merchant,[76] the difficulty in cases involving sections governing ordinary business transactions will be in deciding whether a given farmer *is* a merchant. Likewise, for cases involving the implied warranty of merchantability, the problem will be whether a given farmer can be considered a merchant with respect to the kind of goods involved. The following factors, at least some of which were used in *Vince,* and which appear frequently in the cases, may provide guidance: the length of time the farmer has farmed, the size of the operation, the farmer's familiarity with the product raised, and the farmer's experience in the marketplace.[77] Regardless of the particular factors used, *Vince* clearly says to Mississippi farmers that if they participate in the marketplace, they may well be responsible for knowing the basic rules by which it is governed.[78]

Lisa E. Bourdeaux

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[75] *Id.* at 26-28.

[76] *Id.* at 25.

[77] *See supra* note 36 (detailing cases and some of the factors used in analyzing the merchant status of farmers).

[78] Consider the somewhat exaggerative words of the dissent in *Vince*: "It follows that most farmers should immediately enroll in a law school or employ regularly retained counsel who have expertise in and a deep understanding of 'commercial law' now codified as our Uniform Commercial Code." 443 So. 2d at 29 (Broom, J. dissenting).

It should be noted that § 75-2-314 was amended subsequent to the bringing of the cause of action in *Vince*. *See supra* note 4. The practical impact of *Vince* may be somewhat circumscribed as a result of this amendment. *See* MISS. CODE ANN. § 75-2-314(4) (amending MISS. CODE ANN. § 75-2-314 (1972)).

Torts — Defamation — Retreat into Private Life Does Not Remove Plaintiff's 'Public Figure' Status with Regard to Statements About Past Public Conduct

Plaintiffs Ross and Henry[1] filed a defamation suit in the Circuit Court of Coahoma County seeking damages for alleged misrepresentations made by the defendant[2] in a newspaper article. The article contained assertions that in 1967 the plaintiffs had engaged in corrupt election practices while Ross was campaigning for public office.[3] The article was published in 1980,[4] thirteen years after Ross had retired from public life.[5] The jury found for the plaintiffs and awarded punitive damages for the defendant's libelous conduct.[6] On appeal, the Mississippi Supreme Court, *held*, affirmed.[7] Despite retiring from the public eye and living as a private citizen for many years, a person remains a public figure with respect to his past public conduct and must prove actual malice to successfully hold liable a maker of defamatory statements that relate to past public conduct. *Newson v. Henry*, 443 So. 2d 817 (Miss. 1983).

Historically, society has held the honor and reputation of an individual in high esteem[8] and has imposed severe penalties on those

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[1] L.A. Ross, Jr., was a 74-year-old retired farmer who had served as sheriff of Coahoma County from 1960 through 1963. Dr. Aaron Henry, an influential black leader and public official, was also a plaintiff in the suit. Henry actively supported Ross in his two campaigns for sheriff. Newson v. Henry, 443 So. 2d 817, 819-20 (Miss. 1983).

[2] The defendant, Charles Newson, was a political ally of Henry until a personal controversy arose between them. *Id.* at 820. After their dispute, Newson telephoned Wilson F. Minor, a newspaper reporter with *The Capitol Reporter*, and made representations concerning the political relationship between Henry and Ross. Minor published Newson's statements, and was joined in the defamation suit. However, the suit against Minor was transferred to Hinds County. *Id.* at 819.

[3] Newson claimed that Ross paid Henry $3,500 in exchange for Henry's promise to deliver black support in Ross' 1967 campaign for sheriff. *Id.* at 820.

[4] *Id.*

[5] *Id.* at 819.

[6] Plaintiff was awarded $2,500 in punitive damages, despite the fact that no actual damages were shown. *Id.* at 824.

[7] *Id.* at 823-24.

[8] *See* C. Lawhorne, Defamation and Public Officials 1-7 (1971) (slanderous statements forbidden as early as Biblical times). Ancient Mosaic Law commanded, "Thou shalt not bear false witness against thy neighbor." *Exodus* 20:11. In the late nineteenth century, one commentator argued that in some cases a man's honor and reputation were dearer than life itself. F. Pollack, A Treatise on the Law of Torts 286 (3d ed. 1894).

whose communications injured another individual's reputation.[9] Under the common law, an individual could protect his reputation by initiating a defamation action.[10] Common law courts considered defamation a tort of strict liability and held liable any defendant who published false statements of fact.[11] The only defenses to a defamation action

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[9] *See* Schaefer, *Defamation and the First Amendment*, 52 U. COLO. L. REV. 1, 2 (1980) (penalties for defamation included pillory, plucking out offender's tongue, incarceration, and death). As late as 1590, a Puritan minister was sentenced to death by an English court for printing slanderous statements against the Queen. C. LAWHORNE, *supra* note 8, at 3-4. Under the common law, courts divided libel into two categories: seditious libel and defamatory libel. Seditious libel included any comment which was calculated to disturb the internal peace or operations of the government. Defamatory libel, however, involved an individual's reputational interest. P. CARTER, LIBEL AND SLANDER 183-88 (1973). In the seventeenth century, the English Court of Star Chamber established the rule that truth was no defense in seditious libel cases. L. ELDREDGE, THE LAW OF DEFAMATION 325-27 (1978). This English rule remained in force in the colonies until the 1735 trial of Peter Zenger. J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 860-61 (2d ed. 1983) [hereinafter cited as J. NOWAK]. Zenger was accused of political libel against an unpopular governor. 17 Howell's State Trials, 675, 683-84. The judge asserted that libel should be determined according to English common law, which held all criticisms of the government to be libelous. *Id.* at 699-701. Andrew Hamilton, Zenger's lawyer, argued that in the new world, the principles of nature and law granted citizens the right to truthfully oppose arbitrary power. *Id.* at 721. The jury acquitted Zenger on the ground that the publication was based on truth. *Id.* at 723. *See generally* Lovell, *The "Reception" of Defamation by the Common Law*, 15 VAND. L. REV. 1051, 1051-71 (1962) (examination of defamation law from Alfred the Great to 1800's).

[10] Defamation has been defined as a communication which harmed the reputation of another by lowering his good name in the eyes of the community or by discouraging third persons from associating with him. RESTATEMENT (SECOND) OF TORTS § 559 (1976); *see* Belli v. Orlando Daily Newspapers, Inc., 389 F.2d 579, 585 (5th Cir. 1967) (comment subjecting plaintiff to professional ridicule found to be defamatory), *cert. denied*, 393 U.S. 825 (1968); Morrison v. National Broadcasting Co., 19 N.Y.2d 453, 458, 227 N.E.2d 572, 574, 280 N.Y.S.2d 641, 644 (1967) (statement questioning plaintiff's honesty lowered his reputation in community); *see also* Wrought Iron Range Co. v. Boltz, 123 Miss. 550, 558-59, 86 So. 354, 355 (1920) (words which injure an individual's reputation are actionable per se). *See generally* R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS (1980) (thorough examination of law of defamation); Comment, *The Evolution of the Public Figure Doctrine in Defamation Actions*, 41 OHIO ST. L.J. 1009, 1009 (1980) (damage to reputation restored by defamation action).

[11] *See* Taylor v. Hearst, 107 Cal. 262, 40 P. 392, 394 (1895) (defendant found guilty for libel resulting from error in setting type); Morrissey v. Providence Telegram Co., 19 R.I. 124, 32 A. 19, 19 (1895) (negligent statement that plaintiff was ex-convict held defamatory). Common law courts presumed that the defendant published the defamatory statements with actual malice. Binns v. Stokes, 27 Miss. 239, 243 (1854) (defendant required to rebut presumption of malice). Actual malice, as defined by the common law, denoted ill will or spite which actuated an individual to injure another. Scott-Burr Stores Corp. v. Edgar, 181 Miss. 486, 503-04, 177 So. 766, 770 (1938). *See* Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch Inc., *and Beyond: An Analytical*

were truth[12] and privilege.[13] The common law privilege of fair comment,[14] which was developed to give added protection to speech serving an especially important social function,[15] ameliorated the harshness of strict liability.[16] The fair comment privilege protected statements

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Primer, 61 VA. L. REV. 1349, 1357-59 (1975)(synopsis of the purposes served by strict liability).

[12] *See, e.g.*, Bass v. Burnett, 151 Miss. 852, 859, 119 So. 827, 828 (1929) (truth of statement is complete defense); Ward v. Painters' Local Union No. 300, 41 Wash. 2d 859, 252 P.2d 253, 257 (1953) (same). Section 13 of the Mississippi Constitution included truth as a defense in all prosecutions for libel. MISS. CONST. art. III, § 13. Section 97-3-57 of the Mississippi Code requires good motives for justifiable ends when truth was used as a defense. MISS. CODE ANN. § 97-3-57 (1972).

[13] *See* A. HANSON, LIBEL AND RELATED TORTS 79 (1979) (defendant could prevail on basis of truth or privilege even though plaintiff proved elements of cause of action).

Courts divided privileged communications into two general categories: absolute and conditional. Stice v. Beacon Newspaper Corp., 175 Kan. 61, 340 P.2d 396, 399-400 (1959). The defense of absolute privilege was based upon the idea that statements which would be actionable were free from liability because the defendant acted to further some social interest of paramount importance. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 114, at 776-77 (4th ed. 1971). Absolute privileges were limited to a few distinct areas. *See, e.g.*, Krebs v. McNeal, 222 Miss. 560, 576, 76 So. 2d 693, 699 (1955) (absolutely privileged communication limited to legislative, judicial, and military proceedings); Laun v. Union Elec. Co. of Missouri, 350 Mo. 572, 166 S.W.2d 1065, 1069 (1942) (absolute privilege extended to judicial officers, attorneys, jurors, and parties and witnesses in judicial proceedings; and also to publications between husband and wife). A conditional or qualified privilege encompassed statements of an intermediate degree of importance and the immunity conferred was not absolute but conditioned upon publication in a reasonable manner with a reasonable purpose. W. PROSSER, *supra*, at 786. *See* Johns v. Associated Aviation Underwriters, 203 F.2d 208, 211 (5th Cir. 1953) (presumption of good faith and want of malice existed with qualified privilege); Robinson v. Van Auken, 190 Mass. 160, 76 N.E. 601, 602 (1906) (statements made in good faith effort to recover stolen property held conditionally privileged); Montgomery Ward & Co. v. Skinner, 200 Miss. 44, 63-65, 25 So. 2d 572, 576-78 (1946) (statements made in investigation of crime held conditionally privileged); *see also* Gardner v. Standard Oil Co., 179 Miss. 176, 187, 175 So. 203, 205 (1937) (privileged communications carry a presumption of good faith).

[14] The Mississippi Supreme Court has stated that the privilege of fair comment protects publications dealing with political matters, public figures, and candidates for public office. Krebs v. McNeal, 222 Miss. 560, 576-77, 76 So. 2d 693, 699-700 (1955). *See generally* Robertson, *Defamation and the First Amendment*, 54 TEX. L. REV. 199, 201-03 (1976) (fair comment is most significant common law privilege from constitutional standpoint).

[15] *See, e.g.*, Kapiloff v. Dunn, 27 Md. App. 514, 343 A.2d 251, 262-63 (1975) (privilege created to protect free dissemination of information), *cert. denied*, 426 U.S. 907 (1976); *see also* Comment, *Gertz and the Public Figure Doctrine Revisited*, 54 TUL. L. REV. 1053, 1056 (1980) (fair comment doctrine evolved from recognition of increased protection of free speech).

[16] *See* Titus, *Statement of Fact Versus Statement of Opinion - A Spurious Dispute in Fair Comment*, 15 VAND. L. REV. 1203, 1206-11 (1962) (fair comment allowed broader

touching on matters deemed within the public interest and most comments critical of the government and public officials.[17] A person defamed by statements considered within the privilege was, however, able to recover if he could demonstrate that the person making the statement had abused the privilege[18] by acting with actual or express malice.[19]

Prior to 1964 all jurisdictions recognized the privilege of fair comment,[20] but a majority of states refused to apply the privilege to false statements of fact.[21] In *Post Publishing Co. v. Hallam*[22] the Ohio Supreme Court followed the majority rule by refusing to protect certain defamatory statements. The *Post* court determined the extent of the fair comment privilege by balancing the needs of society against the right of a public official to enjoy a good reputation.[23] The court concluded that extending the privilege to false statements of fact would do

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range of protected speech).

[17] Krebs v. McNeal, 222 Miss. 560, 576-77, 76 So. 2d 693, 700 (1955). In Edmonds v. Delta Democrat Publishing Co., 230 Miss. 583, 93 So. 2d 171 (1957), the Mississippi Supreme Court defined the parameters of the fair comment privilege. The court stated that one who became a public or quasi-public figure invited criticism. *Id.* at 590-91, 93 So. 2d at 173. Such criticism was privileged if it (1) was in opinion form; (2) was fair in that the reader could understand the factual basis of the criticism; and (3) was related to the individual's public life and dealt with a public interest matter. *Id.*, 93 So. 2d at 173. The court further stated that the privilege was abused if the statement of fact was false. *Id.* at 592, 93 So. 2d at 174.

[18] *See, e.g.*, Crowell-Collier Publishing Co. v. Caldwell, 170 F.2d 941, 943 (5th Cir. 1948) (Governor required to prove editorial writer abused privilege of fair comment); Sumner Stores of Mississippi, Inc. v. Little, 187 Miss. 310, 326, 192 So. 857, 862 (1940) (malicious accusations made in the heat of argument exceeded qualified privilege).

[19] *See, e.g.*, Potts v. Dies, 132 F.2d 734, 735 (D.C. Cir. 1942) (fair comment not actionable in absence of bad faith), *cert. denied*, 319 U.S. 762 (1944); Hartmann v. Boston Herald-Traveler Corp., 323 Mass. 56, 80 N.E.2d 16, 19 (1948) (comments ridiculing chairman of peace movement were not malicious). Privileged communications, unlike other defamatory statements, did not carry a presumption of malice. Gardner v. Standard Oil Co., 179 Miss. 176, 187, 175 So. 203, 205 (1937).

[20] W. PROSSER, *supra* note 13, at 819.

[21] *See* Parsons v. Age-Herald Publishing Co., 181 Ala. 439, 61 So. 345, 348 (1913) (false aspersion on conduct of public officer constituted libel); Mencher v. Chesley, 297 N.Y. 94, 96-97, 75 N.E.2d 257, 259-60, 61 N.Y.S.2d 147, 151 (1947) (false charge that public official was Communist not privileged); Westropp v. E.W. Scripps Co., 140 Ohio St. 365, 74 N.E.2d 340, 346 (1947) (false statements against candidate not protected by fair comment).

[22] 59 F. 530 (6th Cir. 1893). The plaintiff, an Ohio resident, was a candidate for United States Congress. *Id.* at 531. Prior to the election, the defendant published an article which falsely stated that the plaintiff never paid his federal taxes. *Id.* at 532-33.

[23] *Id.* at 540-41.

more harm than good.[24] In *Coleman v. MacLennan*,[25] the Kansas Supreme Court followed the minority position which extended the fair comment privilege to false statements published in good faith.[26] The *Coleman* court noted the constitutional guarantee of free speech[27] and emphasized the importance of public debate. The court concluded that public discussion overshadowed possible injury to a public official's reputation.[28]

In 1964, the United States Supreme Court adopted the minority position of the fair comment doctrine in *New York Times v. Sullivan*.[29] In a unanimous decision, the Court established that the first amendment imposed limitations on defamation actions brought by public officials.[30] The Court stated that when public debate on public issues was

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[24] *Id.* The *Post* court refused to grant protection to false defamatory statements on the ground that to do so might drive honorable and worthy men from politics and public service. *Id.*

Basing its holding on reasoning similar to *Post*, the Mississippi Supreme Court, in Oakes v. State, 98 Miss. 80, 54 So. 79 (1910), followed the majority rule. The *Oakes* court refused to grant protection for false statements. *Id.* at 96, 54 So. at 84. The court stressed that a false statement imputing a criminal offense or immoral conduct to a public official was not privileged. *Id.*, 54 So. at 83-84. While acknowledging that an individual is privileged to criticize public officials, the court asserted that the privilege in no way embraced the right to make false statements. *Id.*, 54 So. at 84.

[25] 78 Kan. 711, 98 P. 281 (1908). The plaintiff, the state attorney general, was a candidate for reelection. A newspaper publisher printed an article which falsely alleged that the plaintiff mismanaged state school funds. 98 P. at 281.

[26] *Id.* at 292; *see also* Charles Parker Co. v. Silver City Crystal Co., 142 Conn. 605, 116 A.2d 440, 445 (1955) (good faith misstatements of fact made without malice were within fair comment privilege); Clancy v. Daily News Corp., 202 Minn. 1, 277 N.W. 264, 268 (1938) (public office candidate forced to prove bad faith as well as falsity of statements).

[27] 98 P. at 286. The first amendment prohibits Congress from passing laws which might infringe a citizen's right to free speech and free press. U.S. CONST. amend. I.

More than 40 state constitutions extend broad protections to speech and press. Beauharnais v. Illinois, 343 U.S. 250, 292 (1951). The Mississippi Constitution guarantees the freedoms of speech and press as "sacred rights" for the enjoyment of every citizen. MISS. CONST. art. III, § 13.

[28] 98 P. at 286. The court stressed that discussions of the character and qualifications of a candidate were of vast importance to the state and society. *Id.*

[29] 376 U.S. 254 (1964). The plaintiff, a Montgomery, Alabama commissioner, supervised the city police. *Id.* at 258. He based his action on a civil rights advertisement that had appeared in the defendant's newspaper. The advertisement was critical of police department action. *Id.* at 256. It was uncontroverted that the advertisement contained inaccurate statements. *Id.* at 258.

[30] *Id.* at 292. The Court failed to recognize any constitutional protection of defamatory publications before *New York Times*. *See* Roth v. United States, 354 U.S. 476, 483 (1957) (intent of first amendment was not to protect every word); Beauharnais v. Illinois,

robust, some false statements were inevitable.[31] The Court reasoned that a law which required criticism of official conduct to contain only guaranteed true statements of fact would limit public discourse and quiet potential government critics.[32] The *New York Times* Court held that any public official who sought damages for defamatory falsehoods which related to his official conduct had to prove actual malice.[33] Actual malice, unlike the common law meaning denoting ill will or spite,[34] was defined as a statement made with a knowledge of its falsity or in reckless disregard of whether the statement was true or false.[35]

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343 U.S. 250, 266 (1952) (libel was not constitutionally protected speech); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (prevention and punishment of libel was never in conflict with Constitution).

The *New York Times* decision elevated the privilege of fair comment to that of a constitutional provision. W. PROSSER, *supra* note 13, § 118, at 819. The *New York Times* court concluded that the privilege of fair comment was required by the first amendment. 376 U.S. at 283. *See* Birney, *Libel and the First Amendment — A New Constitutional Privilege*, 51 VA. L. REV. 1 (1965)(general discussion of *New York Times*); Pierce, *The Anatomy of an Historic Decision:* New York Times Co. v. Sullivan, 43 N.C.L. REV. 315 (1964)(same).

[31] 376 U.S. at 270-71.

[32] *Id.* at 279. The Court reasoned that national commitment to free speech demanded that freedom of expression be accorded due "breathing space." *Id.* at 271-72 (quoting NAACP v. Button, 371 U.S. 415, 445 (1966)). The Supreme Court asserted that constitutional safeguards were fashioned to ensure an unfettered opportunity for free political discussion. The Court noted that societal values are advanced by wide dissemination of information and by public discussion of important matters. While recognizing that erroneous statements invariably resulted from free debate, the Court concluded that injury to an official's reputation did not warrant the suppression of free speech. 376 U.S. at 270-72.

The Supreme Court's emphasis on the importance of protecting free speech and debate has been echoed in lower courts. *See, e.g.*, Liberty Lobby, Inc. v. Pearson, 390 F.2d 489, 490-91 (D.C. Cir. 1968) (first amendment protects free expression and exchange of ideas, regardless of merit); Manbeck v. Ostrowski, 384 F.2d 970, 977-78 (2d Cir. 1967) (wide latitude should be given in public discussion of public matters), *cert. denied*, 380 U.S. 966 (1968).

[33] 376 U.S. at 279-80. State courts have consistently followed the Court's holding. *See, e.g.*, Gulf Publishing Co. v. Lee, 434 So. 2d 687, 696 (Miss. 1983) (county supervisors required to prove actual malice by clear and convincing evidence); Klein v. Prial, 32 A.D.2d 925, 302 N.Y.S.2d 295, 297 (N.Y. App. Div. 1969) (public official had to prove actual malice of person who criticized his conduct).

[34] *See supra* note 11. In *New York Times*, the Supreme Court was not referring to common law malice but rather to knowledge of falsity or reckless disregard of the truth. *See* 376 U.S. at 279-80; *see also* Garrison v. Louisiana, 379 U.S. 64, 78 (1964) (Court distinguished between common law malice and *New York Times* actual malice). *See generally* Note, *Public Figures and the Passage of Time*, 39 WASH. & LEE L. REV. 1327, 1329-30 (1982) (discussion of malice both at common law and in *New York Times*).

[35] 376 U.S. at 280. The Supreme Court defined reckless disregard in St. Amant v.

Three years later, the United States Supreme Court extended the actual malice requirement to suits brought by public figures in *Curtis Publishing Co. v. Butts*.[36] In a plurality opinion, Justice Harlan stated that popular interest in public figures was no less than the interest in public officials. He reasoned that in order to meet federal requirements, the public figure would have to show that publication of the defamatory matter amounted to highly unreasonable conduct.[37] Chief Justice Warren wrote in concurrence that public figures, like public officials, were often major forces in society and consequently should be held to the same standard as public officials.[38] According to the Chief Justice, the citizenry had a vital interest in uninhibited debate concerning such individuals.[39]

Thompson, 390 U.S. 727 (1968). In *St. Amant*, the Court stressed that reckless disregard could not be shown by mere negligence or ill will. The Court asserted that reckless disregard required a showing that the defendant entertained serious doubts about the truth of the statements he published. *Id.* at 730-33; *see also* Beckley Newspaper Corp. v. Hawks, 389 U.S. 81, 83-84 (1967) (plaintiff failed to prove reckless disregard by showing only that defendant neglected to conduct an affirmative investigation).

Thus, under the reckless disregard standard, a defendant may negligently defame a public figure without incurring liability. *See* Ross v. News Journal Co., 229 A.2d 531, 532-33 (Del. 1967) (reporter's unintentional mistake negates inference of reckless disregard); Tagawa v. Main Publishing Co., 50 Hawaii 648, 448 P.2d 337, 340-41 (investigatory negligence held not actual malice), *cert. denied*, 396 U.S. 822 (1969).

[36] 388 U.S. 130 (1967). Butts, a well known college football coach, sued a magazine in response to an article it published which implied that he had "fixed" a college football game. *Id.* at 134-35.

[37] *Id.* at 154-55.

[38] *Id.* at 162-65 (Warren, C.J., concurring). In his concurrence, Chief Justice Warren noted that while some individuals were not involved in the political process, they did play an influential role in society and possessed access to the media to counter criticism of their conduct. The Chief Justice reasoned that public figures were not subject to the restraints of the political process, and public opinion might be society's only instrument for influencing a public figure's conduct. *Id.* at 164. While there was no majority opinion for the Court, part of Chief Justice Warren's concurring opinion mustered four additional votes. *Id.* at 170-77. Justice Black, with whom Justice Douglas joined, concurred in the portion of the Chief Justice's concurrence which extended the *New York Times* standard to public figures. *Id.* at 170 (Black, J., concurring in part). Justice Brennan, with whom Justice White joined, also concurred in the same portion of Chief Justice Warren's concurrence. *Id.* at 172 (Brennan, J., concurring in part).

A number of jurisdictions have followed *Butts* and in so doing have cited Chief Justice Warren's concurring opinion as the holding of the Court. *See* Perry v. Columbia Broadcasting Sys., 499 F.2d 797, 802 (7th Cir. 1974) (professional actor considered public figure), *cert. denied*, 418 U.S. 883 (1975); Fitzgerald v. Penthouse Int'l Ltd., 525 F. Supp. 585, 588 (D. Md. 1981) (United States military researcher classified as public figure), *aff'd in part*, 691 F.2d 666 (4th Cir. 1982), *cert. denied*, 103 S. Ct. 1277 (1983).

[39] 388 U.S. at 165 (Warren, C. J., concurring). In an opinion rendered on the same

In a 1971 case, *Rosenbloom v. Metromedia, Inc.*,[40] the Supreme Court expanded the actual malice standard by discounting the importance of the plaintiff's status and focusing instead on the public interest in a particular event. The Court required the plaintiff to prove actual malice, even though he was not a public figure or public official.[41] The plaintiff, a distributor of nudist magazines, alleged that he had been defamed by a news broadcast which had recounted his arrest under city obscenity laws.[42] In *Rosenbloom,* Justice Brennan's plurality opinion concluded that robust debate on matters of public interest deserved constitutional protection regardless of the status of the plaintiff.[43]

This public interest approach was discredited, however, in *Gertz v. Robert Welch, Inc.*[44] In the majority opinion, the Supreme Court asserted that the public interest approach did not adequately accommodate the state's interest in protecting a private individual's reputation.

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day as *Curtis Publishing Co.*, the Mississippi Supreme Court, in Reaves v. Foster, 200 So. 2d 453 (Miss. 1967), required a public school principal to prove actual malice in his defamation action. *Id.* at 458-59. The defendants published a pamphlet which referred to the plaintiff as a traitor to his race. *Id.* at 454. The *Reaves* court acknowledged that the *New York Times* standard had been extended to anyone engaged in matters of public interest and concern, particularly if connected with government. *Id.* at 458.

[40] 403 U.S. 29 (1971).

[41] *Id.* at 43-44.

[42] *Id.* at 32-37.

[43] *Id.* at 43. The *New York Times* standard has been applied to a wide variety of cases involving a public interest. *See* Cantrell v. Foster City Publishing Co., 484 F.2d 150, 157 (6th Cir. 1973) (actual malice standard protected publication of details of deaths in bridge disaster); Wasserman v. Time, Inc., 424 F.2d 920, 922 (D.C. Cir. 1970) (actual malice required due to public interest and concern); West v. Northern Publishing Co., 487 P.2d 1304, 1306 (Alaska 1971) (actual malice standard applied to article which accused cab company of giving liquor to minors); Whitmore v. Kansas City Star Co., 499 S.W.2d 45, 52 (Mo. Ct. App. 1973) (actual malice standard protected article concerning juvenile officer in detention center). *See generally* Comment, *Further Limits on Libel Actions — Extensions of the* New York Times *Rule to Libels Arising from Discussion of "Public Issue"*, 16 VILL. L. REV. 955, 972-78 (1971) (implications of public issue doctrine).

[44] 418 U.S. 323 (1974). A magazine had described the plaintiff, an attorney who had served as counsel in a controversial trial, as a "Leninist." He sued the publisher. *Id.* at 326-27. The Court found that the plaintiff was not a public figure and that actual malice was therefore not required. *Id.* at 352. In the original action, the district court had concluded that the *New York Times* standard applied without regard to the status of the plaintiff. Gertz v. Robert Welch, Inc., 322 F. Supp. 997, 1000 (N.D. Ill. 1970), *aff'd*, 471 F.2d 801 (7th Cir. 1972), *rev'd*, 418 U.S. 323 (1974). The court of appeals affirmed the district court decision and held that the *New York Times* standard applied to private individuals who had been defamed by the media. Gertz v. Robert Welch, Inc., 471 F.2d 801, 805-06 (7th Cir. 1972), *rev'd*, 418 U.S. 323 (1974).

The Supreme Court reasoned that private individuals needed greater protection than public figures, and thus should not be denied recovery by the *New York Times* standard.[45] The *Gertz* court set forth two characteristics that distinguished private individuals from public figures.[46] First, public figures possessed greater access to the channels of communication and could counter false statements more effectively than private figures.[47] Second, public figures invited public attention

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[45] 418 U.S. at 346. The Court determined that the states' higher interest in protecting a private individual justified giving them greater latitude to provide relief to the private defamation victim than in the case of public figures. The Court concluded that states could define the appropriate standard of liability, as long as they did not impose liability without fault. In conclusion, the Court reasoned that this method provided a more equitable approach because it recognized the strength of the state interest in compensating defamation victims yet relieved the press from the burden of strict liability. Further, the Court held that the states could not permit recovery of punitive damages unless there was a showing of *New York Times* actual malice. *Id.* at 345-49.

In the case of a private individual, some state courts responded to *Gertz* by imposing liability for negligently made misrepresentations. *See* Cahill v. Hawaiian Paradise Park Corp., 56 Hawaii 522, 543 P.2d 1356, 1364 (1975) (summary judgment for defendant vacated where misrepresentation was negligent); Torman v. Wood, 62 Ill. 184, 340 N.E.2d 292, 299 (1976) (negligence standard adopted for defamation of private individual). *See generally* C. LAWHORNE, *supra* note 8, at 233-34 (discussion of state conformity to standard set forth in *Gertz*).

[46] 418 U.S. at 344-45. In attempting to determine the status of the plaintiff, the Supreme Court chose to concentrate on the extent of his participation in the particular controversy that gave rise to the defamation. The Court held that although the plaintiff was well-known with regard to that controversy, he should not be deemed a public personality for all purposes. The *Gertz* court characterized this type of person as a limited purpose public figure. *Id.* at 352. Such a public figure was required to prove actual malice only when the communication in question related to his involvement in a public controversy. R. SACK, *supra* note 10, at 197. *See also* DiLeo v. Koltnow, 200 Colo. 119, 613 P.2d 318, 322 (1980) (ex-policeman was limited public figure in matters related to his discharge); Gleichenhaus v. Carlyle, 226 Kan. 167, 597 P.2d 611, 613 (1979) (real estate agent was public figure for comment on his political contributions).

The *Gertz* court also identified a second type of public figure. An all purpose public figure was a person who had attained pervasive fame or notoriety. 418 U.S. at 351; *see also* Mobile Press Register, Inc. v. Faulkner, 372 So. 2d 1282, 1286 (Ala. 1979) (former holder of public office was public figure for all purposes); Perkins v. Mississippi Publishers Corp., 241 So. 2d 139, 142 (Miss. 1970) (prominent former state politician was public figure for all purposes). Some courts felt that the requirement that an all-purpose public figure prove actual malice in any defamation action was unduly harsh. *See, e.g.*, Buckley v. Esquire, Inc., 344 F. Supp. 1133, 1134 (S.D.N.Y. 1972) (extension of *New York Times* standard to every aspect of private life was extreme). *See generally* Bamberger, *Public Figures and the Law of Libel: A Concept in Search of a Definition*, 33 BUS. LAW. 709, 715 (1978) (personal reputation and privacy eliminated by first amendment requirement of actual malice).

[47] 418 U.S. at 344. The Court stressed that the first remedy available to a defama-

and assumed the risk that accompanied their prominent role in society.[48] The *Gertz* Court concluded that the *New York Times* standard applied to public figures because they relinquished their reputational right to freedom from defamatory statements when they entered the public spotlight.[49]

In recent years, courts have addressed the question whether this relinquishment was permanent or whether it dissipated with the passage of time. This question has been an issue in defamation suits[50] and in actions brought under the related tort of invasion of privacy.[51] In

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tion victim is self-help. The Court emphasized that the injury caused by defamation could be minimized by using available opportunities to contradict the misrepresentation. The Court observed that public figures generally possess a substantial degree of access to the media, but that private individuals lacked adequate opportunities for rebuttal and therefore their reputations needed greater protection. *Id.*

[48] *Id.* at 345. The Court reasoned that most public figures exposed themselves to public view in order to influence the resolution of a particular issue. Accordingly, by participating in public affairs, the individual assumed a role of prominence and invited society's comments. *Id.*

The *Gertz* analysis has been applied by lower courts in their attempts to determine the status of a plaintiff. *See, e.g.*, Littlefield v. Fort Dodge Messenger, 614 F.2d 581, 584 (8th Cir. 1980) (disbarred attorney was not public figure because he had no means of self-help and he had not assumed risk), *cert. denied* 452 U.S. 962 (1981); Peagler v. Phoenix Newspapers, 114 Ariz. 309, 560 P.2d 1216, 1218 (1977) (*Gertz* standard expressly adopted for determining public figure status); Memphis Publishing Co. v. Nicholas, 569 S.W.2d 412, 414 (Tenn. 1978) (status determined by applying *Gertz* analysis).

[49] 418 U.S. at 344-46.

[50] *See* Fitzgerald v. Penthouse Int'l, Ltd., 525 F. Supp. 585, 595 (D. Md. 1981) (in defamation action, passage of time did not erode public figure status), *aff'd in part* 691 F.2d 666 (4th Cir. 1981), *cert. denied*, 103 S. Ct. 1277 (1983); Mobile Press Register v. Faulkner, 372 So. 2d 1282, 1285-86 (Ala. 1979) (public official initiating defamation action 10 years after withdrawal from public life was found to be a public figure); Bandelin v. Pietsch, 98 Idaho 338, 563 P.2d 395, 398 (attorney who filed defamation action for false statements made after his withdrawal from public limelight was a public figure), *cert. denied*, 434 U.S. 931 (1977).

[51] *See* Meeropol v. Nizer, 560 F.2d 1061, 1064 (2d Cir. 1977) (in invasion of privacy action, public figure status did not dissipate with passage of time), *cert. denied*, 434 U.S. 1013 (1978). *But see* Kinsey v. Macur, 107 Cal. App. 3d 265, 165 Cal. Rptr. 608, 612 (Cal. App. 1980) (plaintiff involved in notorious murder trial six years earlier no longer public figure). *See generally*, Comment, *Public Figure Status over Time: A Single Approach to the Retention Problem in Defamation and Privacy Law*, 1982 ILL. L. REV. 951, 951-74 (general disscussion of issue of passage of time in defamation and privacy law).

While the torts of invasion of privacy and defamation are distinguishable, their similarities have led courts to apply the principles of the latter in actions which involved the former. In Time, Inc. v. Hill, 385 U.S. 374 (1967), the United States Supreme Court recognized the similarity between the two torts and extended the constitutional analysis of defamation to a privacy action. In *Hill*, the Court held that in his privacy action,

Rawlins v. Hutchinson Publishing Co.,[52] an invasion of privacy action, the Kansas Supreme Court addressed the effect of passage of time on public figure status.[53] The *Rawlins* plaintiff, fired from a police force ten years earlier, claimed his privacy was invaded by a newspaper article which recounted the event. The plaintiff asserted that he had become a private person since his termination. The *Rawlins* court stated that he had no right of privacy regarding his actions while in office. The court noted that public figures relinquished their privacy rights when they entered the public arena.[54] The *Rawlins* court reasoned that once facts entered the public domain, they remained there as long as anyone considered the information worthy of publication. Once these facts were fully exposed to the public, they could never become private again.[55] Thus, the passage of time had no effect upon public figure status in regard to private facts once revealed to public knowledge.[56]

Four years later, in *Wolston v. Reader's Digest Association*,[57] the United States Supreme Court expressly reserved opinion on how the passage of time effected public figure status.[58] The plaintiff in *Wolston* had been cited for contempt in 1958 for failure to appear before a

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plaintiff had to meet the actual malice standard set forth in *New York Times*. The Court reasoned that a lower burden of proof would discourage public discussion. *Id.* at 389-91. See Nimmer, *The Right to Speak from* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968)(critical analysis of privacy and defamation actions).

[52] 218 Kan. 295, 543 P.2d 988 (1975).

[53] 543 P.2d at 993-96. The court determined that at the time of the events recounted in the challenged publication, the plaintiff was a public figure. *Id.* at 991-92. In addressing the passage of time issue, the court noted that the principles of defamation law have a direct effect on privacy laws. That is, in some instances, a qualified privilege exists to communicate defamatory falsehoods even though the communication amounts to an invasion of the individual's privacy. *Id.* at 992-93.

[54] *Id.* at 989-93. The court reasoned that, while in office, a public official has no right to privacy as to the manner in which he conducts his duties. Such facts were considered public, not private, information. *Id.*

[55] *Id.* at 996. The court based its reasoning on Smith v. National Broadcasting Co., 138 Cal. App. 2d 801, 292 P.2d 600 (1974). 543 P.2d at 995. In *Smith*, the court stated that education of the public about historical events was a legitimate function of the press. 292 P.2d at 602. Once communications had aroused the public's interest, those communications were embedded in history and thus were proper material for recounting. *Id.* at 604.

[56] 543 P.2d at 996. One lower court has stated that the mere lapse of time could provide a basis for a privacy action initiated by a past public figure. *See* Johnson v. Harcourt, Brace, Jovanovich, Inc., 43 Cal. App. 3d 880, 890, 118 Cal. Rptr. 370, 378 (1974).

[57] 443 U.S. 156 (1979).

[58] *Id.* at 166 n.7.

grand jury which was investigating Soviet espionage. The defamation action involved a 1974 article which misconstrued the plaintiff's role in the incident.[59] The Court held that his involvement with the grand jury in the 1950's did not qualify him as a public figure.[60] In his concurrence, Justice Blackmun asserted that consideration of the plaintiff's status in the 1950's was unnecessary, since sixteen years separated his grand jury appearance from the date of the alleged defamatory publication. The concurrence focused on the principles underlying the public figure doctrine and concluded that the elements of access to the media and assumption of the risk were directly affected by the lapse of time. Justice Blackmun reasoned that a defamed party's access to the media to rebut defamatory falsehoods could diminish over a period of years after a public controversy[61] and concluded that in certain instances a plaintiff's retreat to private life could negate any risks the individual had originally assumed.[62]

In a 1980 case, *Brewer v. Memphis Publishing Co.*,[63] the Fifth Circuit Court of Appeals examined Justice Blackmun's concurrence in *Wolston*, but chose not to apply his analysis. The court stated that *Brewer*, unlike *Wolston*, involved a plaintiff whose alleged public figure status was not tied to a historic public controversy. The court found

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[59] *Id.* at 159-63. The contempt proceedings attracted substantial media attention for a six week period. The plaintiff was not convicted of Soviet espionage. The article erroneously represented that the plaintiff was convicted of being a Soviet spy. *Id.*

[60] *Id.* The Court said that the plaintiff had not purposefully injected himself into a public controversy. *Id.* at 166.

[61] *Id.* at 170-71 (Blackmun, J., concurring). During the same term that *Wolston* was decided, the Supreme Court held that to be characterized as a public figure a person's access to the media had to be "regular and continuing." Hutchinson v. Proxmire, 443 U.S. 111, 136 (1979).

[62] *Id.* at 171 (Blackmun, J., concurring). Justice Blackmun distinguished historical and contemporaneous reporting and concluded that historical reporting did not require the same degree of protection as contemporaneous reporting. Justice Blackmun reasoned that historians could examine the accuracy of their statements more effectively than could a reporter who was faced with the constraints of a deadline. Justice Blackmun maintained that one could be a public figure for contemporaneous reporting yet not be a public figure for historical commentary on the same event. *Id.*

Prior to *Wolston*, the Supreme Court addressed the issue of the passage of time in Rosenblatt v. Baer, 383 U.S. 75 (1966). In *Rosenblatt*, the Court noted in dicta that an occasion might arise where a person was so separated from his past exposure that a comment on his conduct would no longer justify application of the *New York Times* standard. *Id.* at 88 n.14.

[63] 626 F.2d 1238 (5th Cir. 1980), *cert. denied*, 452 U.S. 962 (1981). The plaintiff, a steady companion of Elvis Presley during the late 1950's, brought suit against a newspaper based on an article which appeared in 1972. It was undisputed that the article, which told of a reunion between Presley and the plaintiff, was incorrect. *Id.* at 1240.

that the plaintiff in *Brewer* had gained her public figure status through a previous romantic relationship with a famous entertainer. The *Brewer* court held that the plaintiff, though no longer involved in public life, remained a public figure for purposes of commentary on that relationship.[64] Although noting that during the active public figure period a broad range of articles were constitutionally protected, the court suggested that the passage of time might operate to narrow the scope of those statements protected by the *New York Times* standard. The court concluded that constitutional protection should be granted only to statements which pertained to the public figure's basis for fame.[65]

In *Street v. National Broadcasting Co.*,[66] decided one year after *Brewer*, the Sixth Circuit Court of Appeals held that a forty year interval between the controversy which made the plaintiff a public figure and publication of the alleged defamatory material was not enough for her to lose public figure status regarding that controversy.[67] In determining the status of the plaintiff, the Sixth Circuit applied the approach set forth in *Gertz* and concluded that public figure status was maintained despite the passage of time.[68] Contrary to Justice Blackmun's views in *Wolston*,[69] the court in *Street* maintained that public figures who had retreated into seclusion did not lose their access to the media and were able to comment on their role in a past public contro-

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[64] *Id.* at 1256-57. The Fifth Circuit noted that after her withdrawal from public life, the plaintiff's name continued to appear in stories about Elvis Presley. *Id.*; *see also* Wynberg v. National Enquirer, Inc., 564 F. Supp. 924, 929 (C.D. Cal. 1982) (plaintiff was public figure in anything that related to his past relationship with famous actress).

[65] 626 F.2d at 1257-58.

[66] 645 F.2d 1227 (6th Cir. 1981), *cert. dismissed as moot*, 454 U.S. 1095 (1981). The plaintiff, a star witness in a controversial rape trial in the 1930's, claimed that a television drama protrayed her in a defamatory way. The plaintiff had disappeared from public view after the 1933 trial. *Id.* at 1229-32.

[67] *Id.* at 1235. Some courts have held that public figure status remained even though a public figure had returned to private life years earlier. *See, e.g.*, Time, Inc. v. Johnston, 448 F.2d 378, 381 (4th Cir. 1971) (retired professional athlete required to prove actual malice).

[68] 645 F.2d at 1234. The court stated that, under *Gertz*, a plaintiff's status must be determined by examining the controversy and the part the plaintiff played in the event. The court interpreted *Gertz* as establishing three factors to be used in ascertaining the plaintiff's status in a controversy: first, the nature and extent of the plaintiff's role in the controversy; second, the plaintiff's access to the media for counteracting the false statements; and third, the extent to which the plaintiff voluntarily thrust himself to the forefront of the public controversy. The majority of the court found that the plaintiff was a public figure at the time of the controversy. *Id.* at 1234-35.

[69] *See supra* notes 57-62 and accompanying text (discussing *Wolston*).

versy.[70] Basing its holding on prior case law,[71] the Sixth Circuit reasoned that public interest in the controversy outweighed the plaintiff's right to protect her reputation. The court concluded that, once an individual became a public figure through participation in a public controversy, the individual remained a public figure for later treatment or commentary on that controversy.[72]

In the instant case, the Mississippi Supreme Court stated that since the fair comment doctrine subjected a public figure to a higher burden of proof than a private person, it was essential to determine the status of plaintiff Ross.[73] Since Ross sought an elective office in 1967, he was a public figure at that time as a matter of law.[74] Since Ross had returned to private life before the alleged defamatory statement was published, it was necessary to determine whether he had lost his public figure status with the passage of time.[75] Relying on prior case law, the court determined that since Ross had attained public figure status in his 1967 campaign, then he retained that status for later commentary on the events which made him a public figure.[76] The court further de-

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[70] 645 F.2d at 1236. In a dissenting opinion, Judge Peck, following the reasoning of Justice Blackmun in *Wolston*, asserted that the plaintiff was not a public figure. *Id.* at 1247 (Peck, J., dissenting). Judge Peck argued that the plaintiff's power to rebut the false statements through media access was no longer as great as it had been at the time of the initial controversy. *Id.* at 1248. Judge Peck concluded that the court's expectation that an individual had access to the media to rebut the falsehoods was unfounded and therefore placed too great a burden on the plaintiff. *Id.*

[71] *Id.* at 1236. The court of appeals referred to the analysis of the Fifth Circuit in Brewer v. Memphis Publishing Co., 626 F.2d 1238 (5th Cir. 1980), *cert. denied*, 452 U.S. 962 (1981). 645 F.2d at 1235.

The Sixth Circuit sought to further corroborate its holding by citing the Second Circuit's opinion in Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978). 645 F.2d at 1235. In *Meeropol*, the plaintiffs, the natural children of Julius and Ethel Rosenburg, were held to be public figures for purposes of subsequent commentary on the famous Rosenburg trial. 560 F.2d at 1064. The *Meeropol* court never addressed the passage of time issue, but the Sixth Circuit interpreted the *Meeropol* decision as a silent assumption that public figure status was retained over the passage of time. 645 F.2d at 1235.

[72] 645 F.2d at 1235-36. The court reasoned that the nation is dependent on the opportunity to freely debate public issues. *Id.* The court considered the public figure doctrine to be the proper vehicle for enabling publishers to provide information free of the fear of liability. *Id.* at 1236. The *Street* court stressed that a publisher must be able to comment on historical events without being deterred by the threat of liability. *Id.*

[73] Newson v. Henry, 443 So. 2d 817, 821 (Miss. 1983).

[74] *Id.* at 823. The court cited Manasco v. Walley, 216 Miss. 614, 63 So. 2d 91 (1953), in support of this conclusion.

[75] 443 So. 2d at 821.

[76] *Id.* at 821-23. The court relied on Street v. National Broadcasting Co., 645 F.2d

termined that since Ross had withdrawn from public life, he should be deemed a private figure for events which occurred after he left public life.[77] The court stated that since Ross was a public figure during the events to which the alleged defamatory statements referred, then Ross was required to prove the *New York Times* standard of actual malice. The court reasoned that since Newson's statements were motivated by anger and since the statements were made without a reasonable factual basis, then the evidence supported a finding of reckless disregard for the truth.[78] The court concluded that since plaintiffs established that the defendant acted with actual malice they were entitled to damages.[79]

1227 (6th Cir.), *cert. dismissed as moot*, 454 U.S. 1095 (1981), and Rawlins v. Hutchinson Publishing Co., 218 Kan. 295, 543 P.2d 388 (1975). 443 So. 2d at 823; *see supra* notes 52-56, 66-72 and accompanying text (discussing *Rawlins* and *Street*).

[77] 443 So. 2d at 823.

[78] *Id.* at 823-24.

[79] *Id.* The jury awarded punitive damages but no actual damages. On appeal, the defendant contended that an award of actual damages was a prerequisite to punitive damages. The court concluded, however, that prior Mississippi case law supported an award of this type. *Id.* at 824.

In an 1876 libel action, the Mississippi Supreme Court awarded the plaintiff punitive damages despite the absence of proof of actual harm or damages. Hubbard v. Rutledge, 52 Miss. 581, 584 (1876). Later, the Mississippi Supreme Court interpreted an actionable words statute to permit an award of exemplary damages without proof of actual harm. Jefferson v. Bates, 152 Miss. 128, 132, 118 So. 717, 719 (1928); Wells v. Branscome, 222 Miss. 1, 6, 74 So. 2d 743, 746-47 (1954). In 1955, the Mississippi Supreme Court stated that general damages and malice are presumed in cases where the words spoken are actionable per se. Travis v. Hunt, 224 Miss. 193, 196, 79 So. 2d 734, 735 (1955). In Wrought Iron Range Co. v. Boltz, 123 Miss. 550, 86 So. 354 (1920), the court stated that *all* libel is actionable per se. 123 Miss. at 558-59. *Id.* at 355. Subsequent cases reiterated this view. *See* Cameron Brothers v. Posey, 237 Miss. 432, 438, 115 So. 2d 138, 140 (1959)(all libel actionable); Heralds of Liberty v. Rankin, 130 Miss. 698, 702, 94 So. 849, 850 (1922)(same).

In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the United States Supreme Court stated that defamation plaintiffs who do not prove *New York Times* malice are restricted to compensation for actual injury. The Court asserted that the doctrine of presumed damages invited juries to punish unpopular opinions rather than to compensate defamation victims for injuries sustained by the publication. *Id.* at 349. Despite the Supreme Court's statement in *Gertz*, state courts are divided over the question whether damages may be presumed and punitive damages awarded in the absence of proof of actual harm. *Compare* Rogers v. Doubleday Co. 644 S.W.2d 833, 835 (Texas 1982) (punitive damages awarded in libel per se action without actual damages) *and* Chow v. Alston, 634 P.2d 430, 434 (Hawaii 1981) (special damages need not be shown when defamation is libelous per se) *with* Gobin v. Globe Publishing Co., 649 P.2d 1239, 1242 (Kansas 1982) (damages for defamation must be established by proof and may not be presumed) *and* Embrey v. Holley, 48 Md. App. 571, 429 A.2d 251, 259 (Md. Ct. Spec. App. 1981) (presumed damages and strict liability are no longer viable in defamation cases), *modified on*

In a special concurrence, Justice Hawkins stated that the treatment of the public figure doctrine by the majority was irrelevant to deciding the case. Since the defendant originated the false story, there was ample evidence of "plain old undiluted malice."[80]

The concurring opinion identifies the main problem in the court's reasoning in *Newson*. Given that actual malice on the part of the defendant was proven, the court's entire discussion of the public figure doctrine is nothing more than dicta. Since the court found that the plaintiffs met the highest possible burden, it was unnecessary to decide whether or not a lesser burden would have sufficed.[81] Unfortunately, because the facts enumerated in the court's opinion do not fully substantiate Justice Hawkins' finding that the defendant knowingly originated a "tale,"[82] it is ambiguous whether Justice Hawkins is distinguishing common law malice—ill will, or intent to injure—from actual malice under *New York Times v. Sullivan*. The court's opinion appears to confuse these two types of malice.[83]

Beyond these major conceptual problems with the opinion in *Newson* the court also failed to engage in an adequate analysis of the public figure doctrine. The public figure doctrine operates to protect public commentary on persons who assume the risk of public exposure[84] and who possess the ability to rebut defamatory falsehoods.[85] The court ignored Justice Blackmun's concurrence in *Wolston*, since they failed to even examine whether the plaintiff still possessed public figure attrib-

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other grounds, 442 A.2d 966 (Md. Ct. Spec. App. 1982).

In other areas of tort law the Mississippi Supreme Court has refused to award punitive damages without proof of actual damages. *See* Mississippi Power Co. v. Jones, 369 So. 2d 1381, 1386 (Miss. 1979) (punitive damages may not be awarded in negligence action unless actual damages are awarded); Blackwell Chevrolet v. Eshee, 261 So. 2d 481, 485 (Miss. 1972) (since punitive damages are "added damages," plaintiff must have suffered some actual damage).

[80] *Id.* at 825. (Hawkins, J., concurring).

[81] *Compare id.* at 821 (need to decide if Ross a public figure so that actual malice standard need be met) *with Id.* at 823 (actual malice proved); *see also id.* at 825 (Hawkins, J., concurring) (public figure status irrelevant).

[82] *Compare id.* at 825 (Hawkins, J., concurring) *with id.* at 823 (court's recital of facts).

[83] The Mississippi Supreme Court stated that "the facts developed anger, spite, ill-will and hostility of" defendant toward plaintiffs. *Id.* at 823. The defendant's anger combined with equivocal testimony to "evidence a reckless disregard for the truth sufficient to support proof of actual malice." *Id.* The court's analysis would seem at odds with how actual malice is defined and distinguished from common law malice in *New York Times v. Sullivan*. *See supra* notes 33-35 and accompanying text.

[84] *See supra* notes 48, 61-62 and accompanying text.

[85] *See supra* notes 38, 47, 61, 70 and accompanying text.

utes in 1980.[86] Although Ross might have assumed the risk of defamatory statements published while he was in the public eye, it is doubtful that he anticipated the publication of defamatory statements developed thirteen years after he had retired from political life. It also strains credibility to imply that a seventy-four year old retired farmer still possesses adequate access to the media to rebut false statements.[87] The court's failure to address the underlying basis of the public figure doctrine as set forth in *Gertz* indicates that the court placed more emphasis on the public interest in discussing the 1967 campaign.[88] This public interest approach, symbolized by *Rosenbloom v. Metromedia, Inc.*, has been discredited by the United States Supreme Court and therefore carries no precedental value.[89]

The *Newson* court's express reliance on *Rawlins* was also misplaced. While *Rawlins* did address the passage of time issue, the issue arose in a privacy action where the set of facts differed significantly from that in the instant case.[90] The defamatory statements in *Rawlins* involved the publication of comments brought before the public while the plaintiff was a public figure and possessed the ability to challenge their accuracy.[91] The defamatory statements in *Newson*, however, were completely new allegations.[92]

The *Newson* court directed its focus on Ross' prior interaction with society. While this analysis is similar to the approach taken by the Fifth Circuit in *Brewer v. Memphis Publishing Co.*, the *Newson* court sidestepped the restrictive language of *Brewer* and failed to recognize the Fifth Circuit's implication that the passage of time may operate to diminish the range of topics protected by the *New York Times* standard.[93] By this holding, the Mississippi Supreme Court has placed on retired public figures alleging defamation the significant burden of proving that the defendant acted with actual malice.[94] With a more detailed analysis, the court could have limited its holding to a more reasonable application of the existing law. Instead, the court set forth a

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[86] *See supra* notes 57-62 and accompanying text.

[87] The reasoning in Judge Peck's dissent in Street v. National Broadcasting Co., 645 F.2d 1227 (6th Cir.), *cert. dismissed as moot*, 454 U.S. 1095 (1981), applies to Ross. *See supra* note 70 and accompanying text.

[88] *See supra* notes 44-49 and accompanying text.

[89] *See supra* notes 40-44 and accompanying text.

[90] *See supra* notes 52-56 and accompanying text.

[91] *See supra* note 54 and accompanying text.

[92] *See* 443 So. 2d at 824-25 (text of defamatory article).

[93] *See supra* notes 63-65 and accompanying text.

[94] 443 So. 2d at 823.

broad rule with uncertain standards. The effect of passage of time on a public figure's status is presently unclear. Instead of aiding the development and clarification of this area of the law with an in-depth examination, the court chose to take a superficial approach which left more questions than answers.

James Lloyd Halford
Jean Alice Hogan

Taxation—Computation of Gain or Loss—The Amount Realized from the Disposition of Encumbered Property Includes Nonrecourse Obligations Regardless of the Fair Market Value of the Property

Taxpayers[1] filed a petition in the United States Tax Court[2] seeking to avoid deficiencies assessed them by the Commissioner of Internal Revenue.[3] The taxpayers alleged that by including the amount of nonrecourse mortgage obligation[4] that was in excess of the fair market value of the property, the Commissioner incorrectly calculated the amount realized[5] on the disposal of the property.[6] The taxpayers con-

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[1] In August, 1970, taxpayers J.C. Pelt and Clark, Inc., Pelt's wholly owned corporation, formed a general partnership to which taxpayers John F. Tufts, William T. Steger, James E. Stephens, and Robert C. Austin, Sr. were later admitted. Commissioner v. Tufts, 103 S. Ct. 1826, 1828 (1983). The purpose of the partnership was to construct an apartment complex in Duncanville, Texas. *Id.*

[2] Tufts v. Commissioner, 70 T.C. 756, 761 (1978).

[3] 103 S. Ct. at 1829. In an audit of the partnership, the Commissioner determined that the partners realized a capital gain of approximately $400,000 on disposal of the complex. *Id.*

[4] A nonrecourse obligation is defined as the "[t]ype of security loan which bars the lender from action against the borrower if the security value falls below the amount required to repay the loan." Black's Law Dictionary 953 (5th ed. 1979).

[5] 103 S. Ct. at 1829. I.R.C. § 1001 (1976) defines "amount realized" and provides for the treatment of gains and losses from the disposition of property as follows:

> (a) Computation of Gain or Loss—The gain from the sale or other distribution of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.
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> (b) Amount Realized—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

I.R.C. § 1001.

Section 1016(a) of the Internal Revenue Code provides for adjustments to basis:

> Proper adjustment in respect of the property shall in all cases be made—
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> (1) for expenditures, receipts, losses, or other items, properly chargeable to capital account . . . for which deductions have been taken by the taxpayer in determining taxable income for the taxable year or prior taxable years;
>
> (2) . . . for exhaustion, wear and tear, obsolescence, amortization, and depletion . . . .

I.R.C. § 1016(a) (1976).

[6] 103 S. Ct. at 1829. After experiencing a depressed rental market, the taxpayers were unable to meet their mortgage payments and sold their respective interests to an

tended that the amount realized could not exceed fair market value, which meant that they had in fact sustained a loss[7] and were entitled to a refund.[8] Furthermore, the taxpayers contended that footnote thirty-seven of *Crane v. Commissioner*[9] or, alternatively, section 752(c) of the Internal Revenue Code compelled this conclusion.[10] The Tax

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unrelated third party, Fred Bayles. As consideration, Bayles agreed to pay sales expenses and to assume the mortgage, on which the taxpayers were not personally liable. At the time of transfer, the debt outstanding was $1,851,500 and the taxpayers' adjusted basis in the complex was $1,455,740. *Id.*

The Commissioner calculated the gain as follows:

Amount Realized	$1,851,000
Less: Adjusted Basis	(1,455,740)
Gain	$ 395,760

Adjusted basis was computed as follows:

Purchase Price	$1,851,500
Less: Depreciation Taken	(395,760)
Adjusted Basis	$1,455,740

Of the total capital gain, $348,661 was treated as long term gain under I.R.C. § 741 (1976), and the remaining $47,099 was recaptured under I.R.C. § 1250 (1976 & Supp. V 1981) as ordinary income. 103 S. Ct. at 1829 n.2. The fair market value of the property at the date of its disposal was $1,400,000. *Id.* at 1829 n.1.

[7] 103 S. Ct. at 1829. The taxpayers contended that the true result of the disposition was a loss computed as follows:

Adjusted Basis	$1,455,740
Less: Fair Market Value	(1,400,000)
Loss	($ 55,740)

Id. at 1829 n.1.

[8] *Id.* at 1829. The taxpayers did not claim a refund for their proportionate shares of the partnership loss on their individual returns, but did, however, in their petition to the Tax Court. *Id.* at 1829 n.1.

[9] 331 U.S. 1 (1947). The taxpayers argued that when the fair market value of property was less than the debt it secured, footnote thirty-seven implied that the amount realized upon disposition was limited to the value of the property. *Tufts v. Comm'r,* 651 F.2d 1058, 1060 (5th Cir. 1981). *See infra* note 41.

[10] 103 S. Ct. at 1834-36. I.R.C. § 752 (1976) provides for the treatment of certain partnership liabilities:

> (a) Increase in partner's liabilities.—Any increase in a partner's share of the liabilities of a partnership, or any increase in a partner's individual liabilities by reason of the assumption by such partner of partnership liabilities, shall be considered as a contribution of money by such partner to the partnership.
> (b) Decrease in partner's liabilities.—Any decrease in a partner's share of the liabilities of a partnership, or any decrease in a partner's individual liabilities by reason of the assumption by the partnership of such individual liabilities, shall be considered as a distribution of money to the partner by the partnership.

Court upheld the Commissioner's contrary position.[11] The United States Court of Appeals for the Fifth Circuit adopted the taxpayers' position and reversed the Tax Court.[12] On writ of certiorari, the United States Supreme Court, *held*, reversed. The amount realized on the disposition of property subject to nonrecourse obligations exceeding the property's fair market value properly includes the outstanding portion of the obligation, regardless of the fair market value of the property. *Commissioner v. Tufts*, 103 S. Ct. 1826 (1983).

It has long been established that the amount realized on disposition of property included the amount of personal recourse obligations discharged in the transaction.[13] However, for nearly half a century the courts failed to settle the issue of whether the amount realized from the disposition of property included nonrecourse indebtedness.[14] In a

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(c) Liability to which property is subject.—For purposes of this section, a liability to which property is subject shall, to the extent of the fair market value of such property, be considered as a liability of the owner of the property.

(d) Sale or exchange of an interest.—In case of a sale or exchange of an interest in a partnership, liabilities shall be treated in the same manner as liabilities in connection with the sale or exchange of property not associated with partnerships.

I.R.C. § 752.

Taxpayers contended that the fair market value limitation language of I.R.C. § 752(c) applied to the disposition of partnership interest in I.R.C. § 752(d), thus alternatively supporting their position. 103 S. Ct. at 1834-35.

[11] 103 S. Ct. at 1829.

[12] *Id.* The Fifth Circuit expressly disagreed with the lower court's holding and questioned its theoretical basis. *Id.* For a discussion of the Fifth Circuit's rationale, *see infra* notes 63-72 and accompanying text.

[13] Friedland, *Tufts and Millar: Two New Views of the Crane Case and Its Famous Footnote*, 57 NOTRE DAME LAW. 510, 511 (1982). *See, e.g.*, United States v. Hendler, 303 U.S. 564, 567 (1938) (in merger of Borden Company and Hendler Company, Hendler held taxable on recourse debt paid and assumed by Borden); United States v. Kirby Lumber Co., 284 U.S. 1, 3 (1931) (in redemption of bonds, Kirby held taxable on excess of par value over redemption price).

[14] Note, *Income Tax: Gain Computation—Footnote Thirty-seven Exception of Crane Applied to Limit the Inclusion of Nonrecourse Debt in Amount Realized to the Fair Market Value of Disposed Depreciable Real Estate—Tufts v. Commissioner*, 55 TEMP. L.Q. 162, 162 (1982).

The issue of including mortgages and other nonrecourse debts in the amount realized upon forgiveness or surrender of a mortgage and the economic benefit derived therefrom in some cases simply was not addressed. The courts found instead that no sale or exchange had occurred. *Id.* at 178. *See, e.g.*, Hilpert v. Commissioner, 151 F.2d 929, 933 (5th Cir. 1945) (in redemption of property from mortgage, nonrecourse debt not included in amount realized); Commonwealth, Inc. v. Commissioner, 36 B.T.A. 850, 853 (1937) (in conveyance of property to mortgagee for discharge of nonrecourse mortgage, nonrecourse debt not included in amount realized).

1943 decision, *Lutz & Schramm Co. v. Commissioner*,[15] the Tax Court first addressed the inclusion of nonrecourse indebtedness in excess of the fair market value of the property transferred in the amount realized.[16] Several months after acquiring a manufacturing facility, the taxpayer borrowed money and executed a mortgage on the property as security for the debt.[17] When the taxpayer later experienced financial difficulties, the creditors accepted the plant in satisfaction of the indebtedness.[18] The fair market value of the plant was less than the unpaid balance of the nonrecourse debt.[19] In its application for a refund, the taxpayer argued that the amount realized could not exceed the property's fair market value at transfer, and thus no gain had resulted.[20] The Tax Court rejected this assertion and held that the fair market value of property transferred subject to nonrecourse debt, incurred after its acquisition,[21] was immaterial in calculating the taxpayer's gain or loss.[22] Finding that a gain had resulted, the court noted that the only question was whether the taxpayer had realized a gain

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[15] 1 T.C. 682 (1943).

[16] *Id.* at 688-89.

[17] *Id.* at 684. Initially the loan was guaranteed by a bond from the taxpayer. The lender later renegotiated the note and agreed to look exclusively to the land and buildings to satisfy the debt. *Id.*

[18] *Id.* at 685.

[19] *Id.* At the date of transfer, the fair market value of the property was $97,000, and the unpaid principal of the mortgage was $300,000. *Id.*

[20] *Id.* The taxpayer had reported a capital gain of $42,564.58 in its 1937 return resulting from the surrender of its plant facility and later contended that this was erroneous. *Id.* The gain was computed as follows:

Mortgage Principal Discharged	$300,000.00
Less: Adjusted Basis	(257,435.42)
Gain	$ 42,564.58

Id. at 688-89. The reduction in basis was due to depreciation deductions taken from 1924 until 1937. *Id.* at 685.

[21] *Id.* at 689. The court emphasized that its decision concerned a non-purchase money mortgage. *Id.* at 684. One commentator has noted that the first case to directly address whether amount realized was limited to fair market value on purchase money mortgages in excess of basis was Millar v. Commissioner, 67 T.C. 656 (1977), 577 F.2d 212 (3rd Cir. 1978), *cert. denied*, 439 U.S. 1046 (1978). Sanders, *Sup. Ct., Ending Crane Controversy, Says Nonrecourse Debt is Always Part of Sales Price*, 59 J. TAX'N 2, 2 (1983). *See infra* notes 46-62 and accompanying text.

[22] 1 T.C. at 689. One writer has suggested that the court simply sidestepped the question whether nonrecourse debt may be included in amount realized. Note, *supra* note 14, at 178. *Cf.* United States v. Kirby Lumber Co., 284 U.S. 1, 3 (1931) (corporation held taxable on repurchasing its bonds at less than par value); Lakeland Grocery Co. v. Commissioner, 36 B.T.A. 289, 291-92 (1937) (insolvent debtor held taxable when creditor's discharge of indebtedness sufficient to make debtor solvent).

from the disposition of the property itself, and not whether income was realized by the discharge of indebtedness.[23]

Three years later in *Crane v. Commissioner*,[24] the United States Supreme Court addressed the question whether an unassumed mortgage should be taken into account when computing a taxpayer's basis in property as well as the amount realized from the property's sale.[25] The taxpayer in *Crane* inherited property subject to an unassumed mortgage that exactly equalled the fair market value of the encumbered property.[26] From 1932 through 1938, the taxpayer continued to operate the property under a plan whereby she remitted the net rentals to the mortgagee as payment on the debt.[27] In 1938, under the

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[23] 1 T.C. at 689. The court noted that the initial receipt of the mortgage funds constituted a benefit that had to be accounted for at the time the property was transferred in discharge of the debt. Therefore, the court stated that the net result of the transaction was that, in 1937, the taxpayer received $300,000 for property with an adjusted basis of $257,435.42, thus incurring taxable gain of $42,564.58. *Id.* at 688-89. *See supra* note 20.

Subsequent Tax Court decisions have similarly relied on the benefit received from nonrecourse borrowing to include the nonrecourse debt in amount realized. In Woodsam Assoc., Inc. v. Commissioner, 16 T.C. 649 (1951), *aff'd*, 198 F.2d 357 (2d Cir. 1952), Wood transferred property subject to a nonrecourse mortgage in excess of its value to the taxpayer, Woodsam Associates, Inc., in a tax-free exchange. The taxpayer took Wood's basis in the property, but never assumed personal liability on the mortgage. 198 F.2d at 358. Upon the later sale of the property in foreclosure, the Tax Court noted that contrary to the taxpayer's contention, borrowings by Wood subsequent to the property's acquisition but prior to the transfer did not result in a stepped-up basis for the taxpayer. Rather, the court held that the taxpayer realized a gain from the prior debt that was merely postponed for tax purposes until the final disposition of the property. *Id.* at 359.

In Mendham Corp. v. Commissioner, 9 T.C. 320 (1947), the elimination of nonrecourse debt in a foreclosure resulted in taxable gain to the extent that the mortgage proceeds exceeded the taxpayer's adjusted basis in the property at foreclosure. *Id.* at 324. The taxpayer acquired the encumbered property from its parent corporation in a tax-free organization. *Id.* at 321. Though initially the basis of the property exceeded the debt it secured, the taxpayer and its parent had taken sufficient depreciation deductions to reduce the adjusted basis below the debt outstanding at foreclosure. *Id.* at 324. In upholding the Commissioner's assessment of a gain, the Tax Court noted that the taxpayer must be treated as would the original mortgagor and thus must account for the cash benefit acquired. *Id.* at 325. *But cf.* Nutter v. Commissioner, 7 T.C. 480, 483 (1946) (release from purchase money mortgage likened to a "reduction of sale price" rather than a "financial betterment").

[24] 331 U.S. 1 (1947).

[25] *Id.* at 6-14.

[26] *Id.* at 2-3. The taxpayer's deceased husband devised an apartment building and lot to her that secured a principal debt of $255,000 and interest in default of $7,042.50 at his death. The property was appraised for federal estate tax purposes at a value equal to the total debt, $262,042.50. *Id.* at 3.

[27] *Id.* at 3. Under the agreement, taxpayer collected the rents, paid the necessary maintenance costs and taxes, and remitted any excess to the mortgagee for reduction of

threat of foreclosure,[28] the taxpayer sold the property to a third party who paid a small amount of cash and assumed the mortgage.[29] The taxpayer reported as taxable gain only the cash received less the expenses of the sale.[30] Her theory was that upon inheritance she acquired only the equity in the property, which was of no value at that date. Thus, the taxpayer contended that since she had not assumed the mortgage, then the amount realized from the sale was limited to the net cash received upon disposition of the property.[31] The Commissioner assessed a deficiency, claiming that the amount realized included not only the net cash received, but also the principal amount of the mortgage.[32]

The Supreme Court issued its holding in two parts. First, the Court analyzed the taxpayer's basis with respect to section 113(a)(5) of

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the debt. *Id.*

[28] *Id.* During the period the interest in arrearage increased from $7,042.50 to $15,857.71. *Id.*

[29] *Id.* Taxpayer sold the property for $3,000. *Id.*

[30] *Id.* at 3-4. Taxpayer computed her gain as follows:

Gross Receipts	$3,000
Less: Expenses of Sale	(500)
Amount Realized	2,500
Less: Adjusted Basis	(0)
Gain	$2,500

Id.

[31] *Id.* at 3. The taxpayer contended in her equity theory that she acquired a zero basis computed as follows:

Fair Market Value of Property	$262,042.50
Less: Mortgage and Interest (at date of death)	(262,042.50)
Basis	$ 0

Id.

The court noted, however, that her zero basis theory was inconsistent with her practice of taking depreciation deductions in the years that she held the property. During the period the taxpayer held the property, she reported gross rents as income and deducted taxes, operating expenses, interest, and depreciation. *Id.* at 3 n.2.

[32] 331 U.S. at 3-4. The Court noted that the Commissioner did not include the interest in his computation of amount realized because it was a deductible item. The Commissioner computed the amount realized by adding the face amount of the unreduced mortgage, $255,000, to the net cash received, $2,500, for a total amount realized of $257,500. *Id.* at 4 n.6. The taxable gain was calculated by the Commissioner as follows:

the Revenue Act of 1938.[33] The principal question before it was the meaning of the term "property" as used in the Act.[34] The Court adopted the view of the Commissioner[35] in ruling that the basis of the

	Land	Buildings
Original Basis	$55,000.00	$207,042.50
Less: Allowable Depreciation	(0)	(28,045.10)
Adjusted Basis	$55,000.00	$178,997.40
Amount Realized	$54,471.15	$203,028.85
Less: Adjusted Basis	(55,000.00)	(178,997.40)
Gain or (Loss)	($528.85)	$ 24,031.45

Id.

The Commissioner took the view that the building was not a capital asset under the Revenue Act of 1938. Section 117(a) (1) of the Act defines capital assets as "property held by the taxpayer . . . but does not include . . . property . . . which is subject to the allowance for depreciation provided in Section 23(1) [Deductions from Gross Income]." Revenue Act of 1938, ch. 289, § 117(a)(1), 52 Stat. 447, 500 (current version at I.R.C. § 1221). The Commissioner allowed the loss sustained on the land to be deducted at the then 50% capital loss rate and the gain from the building was considered fully taxable as ordinary income. 331 U.S. at 4-5. Therefore, the net taxable gain experienced was $23,767.03. *Id.* at 4.

The Commissioner's assessment of a deficiency was partially expunged by the Tax Court in Crane v. Commissioner, 3 T.C. 585 (1944). The Tax Court held that since the taxpayer had no personal obligation to repay the mortgage, then she received no consideration, other than the money, when she conveyed subject to the mortgage. Further, the court held that since the taxpayer paid nothing on the mortgage while she held the property, and since the mortgage equaled the fair market value of the property when she acquired it, her unadjusted basis in the property was zero. Based on its zero basis ruling, the Tax Court disallowed the depreciation deductions taken. *Id.* at 590-91.

In Commissioner v. Crane, 153 F.2d 504 (2d Cir. 1945), the United States Court of Appeals for the Second Circuit reversed the Tax Court's holding and upheld the Commissioner's assessment in full. *Id.* at 506.

[33] 331 U.S. at 6. Section 113(a) provided: "The basis of property shall be the cost of such property; except that . . . (5) . . . [i]f the property was acquired by bequest, devise or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition." Revenue Act of 1938, ch. 289, § 113(a)(5), 52 Stat. 447 (current version at I.R.C. § 1014(a) (Supp. V 1981)).

[34] 331 U.S. at 6. Taxpayer contended that property and equity were equivalent. The Commissioner contended that property referred only to the physical land and buildings or the owner's legal rights in them, undiminished by the mortgage obligation. *Id.*

[35] *Id.* at 6-11. The Court gave three reasons for adopting the Commissioner's view. First, the Court looked to the definitions of property as provided by principal standard dictionaries and found that none of them gave equity as a synonym of property. Indeed, the Court found equity defined as the property's value above the aggregate of the liens. Thus, the Commissioner's definition of property as the consisting of physical things was accepted by the Court. *Id.* at 6-7.

Second, the Court noted that the Commissioner's position was in accordance with

property inherited was its market value unreduced by any mortgage thereon.[36] Second, the Court determined that the amount of nonrecourse indebtedness the taxpayer assumed or took subject to must be included as a component of amount realized on disposition, along with any boot received.[37] The Supreme Court based its holding primarily on the "functional relation" between the basis and amount realized sections of the Act.[38] It noted, however, that a taxpayer who sold property subject to nonrecourse debt realized a "benefit" in the amount of the debt.[39]

The Court explained that its ruling simply concerned the disposition of property subject to a nonrecourse debt of an amount *less* than the property's fair market value.[40] Indeed, in footnote thirty-seven the

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the administrative construction of § 113(a)(5) of the Revenue Act of 1938, which had been in effect since 1918 and reenacted in substantially the same form in the Revenue Act of 1921, ch. 136, § 202(a)(3), 42 Stat. 229. 311 U.S. at 7-8.

Third, the Court reasoned that if property were construed to mean equity, and if basis were limited to equity, depreciation deductions would represent only a fraction of the actual cost of physical deterioration, and any recoupment of the remainder of the depreciation could be obtained only by reducing the mortgagor's taxable gain in the year the property was sold. 331 U.S. at 9-10.

[36] 331 U.S. at 11.

[37] *Id.* at 12. The Court noted that prior cases had held that the amount realized need not involve the receipt of money or other property. *Id.* at 13. *See, e.g.,* United States v. Hendler, 303 U.S. 564, 567 (1938) (assumption and payment of bonded indebtedness held a taxable event); Haass v. Commissioner, 37 B.T.A. 948, 955 (1938) (assumption of indebtedness regarded as receipt of money); Brons Hotels, Inc. v. Commissioner, 34 B.T.A. 376, 381 (1936) (relief of debt previously included in cost basis deemed equivalent to receipt of cash).

[38] 331 U.S. at 12. Revenue Act of 1938, ch. 289, § 111(b), 52 Stat. 447 (current version at I.R.C. § 1001(b) (1976)), defined amount realized as "the sum of any money received plus the fair market value of the property (other than money) received." Section 111(a) of the Revenue Act of 1938 defined gain from the sale or disposition of property as "the excess of the amount realized therefrom over the adjusted basis . . . ." Revenue Act of 1938, ch. 289, § 111(a), 52 Stat. 447 (current version at I.R.C. § 1001(a) (1976)). *See also supra* notes 35-36 and accompanying text. The Court noted that because of the functional relation between amount realized and basis the term "property" as used in the two sections must have the same meaning. 331 U.S. at 12. Thus, the Court held that the amount of the unassumed mortgage was properly included in the amount realized. 331 U.S. at 13.

See also Parker v. Delaney, 186 F.2d 455, 458 (1st Cir. 1950), *cert. denied*, 341 U.S. 926 (1951) (used the functional relationship between § 111 and § 113 of the Revenue Act of 1938 to require inclusion of nonrecourse debt in amount realized).

[39] 331 U.S. at 14. The Court noted that the amount realized was equivalent to that benefit realized when a mortgage was discharged or a personal debt was assumed by another. *Id.*

[40] *Id.* The Court noted that a taxpayer in this position must and will treat the non-

Court noted that a different problem might arise when a mortgagor disposed of property of a lesser value than the nonrecourse debt that it secured.[41] The Supreme Court concluded that the crux of its decision was to prevent the double deduction that would occur if the taxpayer were permitted to exclude allowable deductions from consideration in computing gain.[42] Although the *Crane* decision involved property acquired through inheritance, subsequent decisions applying its theory have held that in addition to devisees, purchasers of property must similarly include the full amount of nonrecourse obligations in their basis and amount realized.[43] Few courts, however, appeared willing to

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recourse mortgage exactly as if it were his personal obligation. *Id.*

[41] *Id.* at 14 n.37. The footnote reads:

> Obviously, if the value of the property is less than the amount of the mortgage, a mortgagor who is not personally liable cannot realize a benefit equal to the mortgage. Consequently, a different problem might be encountered where a mortgagor abandoned the property or transferred it subject to the mortgage without receiving boot. That is not this case.

Id.

At least one commentator has referred to footnote thirty-seven as "the most famous footnote in tax history." Bittker, *Tax Shelters, Nonrecourse Debt, and the Crane Case,* 33 TAX L. REV. 277, 277 (1978).

[42] 331 U.S. at 15. One writer noted that the double deduction referred to by the Supreme Court would have occurred if the taxpayer had been allowed to exclude the nonrecourse mortgage from her basis after previously taking depreciation deductions calculated on the full fair market value of the property. The result, the writer noted, would be that the taxpayer could have accounted for her return of capital both by current deduction and on final disposition of the property. Comment, *Nonrecourse Mortgage Indebtedness As An Amount Realized: Footnote 37 Revisited,* 33 SW. L.J. 1257, 1266 (1980).

The taxpayer contended that the result reached by the Court taxed her on what is not income within the meaning of the sixteenth amendment because she derived no economic benefit from the disposal of her property. 331 U.S. at 15. U.S. CONST. amend. XVI provides that "[t]he Congress shall have power to lay and collect taxes on incomes, from whatever source derived . . . . " The Court cited two prior decisions, Douglas v. Willcuts, 296 U.S. 1, 9 (1935) (alimony payments constitutionally taxable to the payee) and Burnet v. Wells, 289 U.S. 670, 677 (1933) (grantor of trust constitutionally taxed on income of trust applied toward payment of his life insurance premiums), to show that, constitutionally, income arises from sources other than the direct receipt of cash. Thus, the Court held her contentions to be meritless. 331 U.S. at 15. The Court noted that the sixteenth amendment also did not require that double deductions be allowed on the loss of the same asset. 331 U.S. at 16.

For further discussion of the *Crane* case and its significance, see Bittker, *supra* note 41; Del Cotto, *Basis and Amount Realized Under Crane: A Current View of Some Tax Effects in Mortgage Financing,* 118 U. PA. L. REV. 69 (1969); McGuire, *Negative Capital Accounts and the Failing Tax Shelter,* 3 J. REAL EST. TAX 439 (1976); Weiss, *The Crane Case Updated,* 32 TAX LAW. 289 (1979).

[43] *See, e.g.,* Commissioner v. Fortee Properties, 211 F.2d 915, 916 (2d Cir.), *cert.*

invoke the hypothetical reasoning developed by the *Crane* court in footnote thirty-seven.[44] Additionally, the Internal Revenue Service rejected the footnote's implication and noted its opposition through the promulgation of two revenue rulings.[45]

The first case directly addressing the proposition of footnote thirty-seven was *Millar v. Commissioner*.[46] The taxpayers in *Millar* were shareholders in a Subchapter S corporation[47] formed by a close business associate.[48] The corporation's stock was initially issued to the taxpayers for no consideration.[49] The associate then advanced funds to the taxpayers,[50] which they in turn contributed to the corporation.[51] This contribution gave the taxpayers a basis in their shares equal to

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denied, 348 U.S. 826 (1954) (taxpayer required to recognize gain when property subject to nonrecourse debt was involuntarily converted in condemnation); Parker v. Delaney, 186 F.2d 455, 456 (1st Cir. 1950), *cert. denied*, 341 U.S. 926 (1951) (nonrecourse debt included in basis when apartment house was acquired by strawman conveyance); Mayerson v. Commissioner, 47 T.C. 340, 352 (1966) (basis of purchased building included nonrecourse 99-year lease-back mortgage that encumbered it). *But cf.* Estate of Franklin v. Commissioner, 64 T.C. 752, 765 (1975), *aff'd*, 544 F.2d 1045, 1049 (9th Cir. 1976) (nonrecourse lease-back mortgage held too indefinite to include in depreciable basis).

[44] *See, e.g.*, Woodsam Assoc., Inc. v. Commissioner, 198 F.2d 357, 359 (2d Cir. 1952) (corporation taxed on excess of nonrecourse obligation over its adjusted basis on property sold in foreclosure); Mendham Corp. v. Commissioner, 9 T.C. 320, 324-25 (1947) (same).

[45] *See* Rev. Rul. 111, 1976-1 C.B. 214 (unpaid balance of nonrecourse debt cancelled upon return of cattle securing it ruled to be amount realized for gain or loss purposes); Rev. Rul. 164, 1978-1 C.B. 264 (voluntary conveyance to mortgagee of property subject to nonrecourse debt less than basis ruled to be sale for debt resulting in capital loss).

[46] 577 F.2d 212 (3d Cir. 1978), *cert. denied*, 439 U.S. 1046 (1978) (facts reported at 540 F.2d 184 (3d Cir. 1976)). For a concise discussion of *Millar*, see Sanders, *supra* note 21, at 2.

[47] Subchapter S is an alternative form of business organization that provides the following benefits for qualifying corporations: "(1) the pass-through of certain income without 'double' tax, (2) the pass-through of certain losses, and (3) limited liability for shareholders." EUSTICE & KUNTZ, FEDERAL INCOME TAXATION OF SUBCHAPTER S CORPORATIONS 1-10 (1982).

The shareholders in *Millar* filed an election with the I.R.S. to have the organization taxed as a small business corporation under Subchapter S. Therefore, the corporation's net operating loss passed through to the shareholders in proportion to their interests in the corporation. The shareholders were then entitled to deduct that loss in computing their individual tax liabilities. 540 F.2d 184, 185. For the general rules governing the treatment of Subchapter S corporations, see I.R.C. §§ 1371-79 (West Supp. 1983).

[48] 540 F.2d at 185.

[49] *Id.*

[50] The taxpayers as a group were advanced $500,000, which was proportionally divided among them as to their individual interests in the corporation. *Id.*

[51] *Id.*

the amount so contributed.[52] Following the failure of the business, the associate foreclosed on the then valueless shares.[53] As shareholders of a Subchapter S corporation, the taxpayers had deducted their ratable share of corporate losses on their individual returns[54] and had reduced the basis in their shares *pro tanto* as required by the Internal Revenue Code.[55] Since the value of the stock was less than the balance of the debt it secured,[56] the taxpayers, relying on footnote thirty-seven, reported no gain on foreclosure.[57]

The Third Circuit sustained the findings of the Tax Court[58] and held that the transaction had resulted in a taxable gain.[59] The court noted that to hold differently after the taxpayers had realized a prior economic benefit from the transaction[60] would be to allow them the double deduction disapproved of in *Crane*.[61] The Third Circuit further noted that footnote thirty-seven was merely dicta and should be viewed as such and not as a literal exception to the principal holding of *Crane*.[62]

Shortly after *Millar* was decided, the Fifth Circuit in *Tufts v. Commissioner*[63] held that the amount realized on the disposition of property subject to nonrecourse debt was limited to the extent of the fair market value of the property.[64] By reversing the Tax Court's deci-

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[52] *Id.*

[53] *Id.*

[54] *Id.* During the period the taxpayers held the stock, deductions taken enabled them to offset approximately $298,000 of outside income from federal taxation. *Id.*

[55] *Id.* at 186. I.R.C. § 1367(a)(2) (West Supp. 1983) provides that "[t]he basis of each shareholder's stock in an S corporation shall be decreased for any period (but not below zero) by . . . (B) the items of loss and deduction . . . ."

[56] 577 F.2d at 215. The taxpayers' total adjusted basis at the time of foreclosure was $39,492, and the outstanding nonrecourse debt was $245,000. Relying on *Crane*, the Commissioner included the value of the nonrecourse debt in the amount realized and found their taxable gain to be $205,508 ($245,000-$39,492). 557 F.2d at 215.

[57] *Id.* at 214. *See supra* note 41.

[58] 577 F.2d at 214. Citing *Crane* for authority, the Tax Court held that since basis properly includes a nonrecourse mortgage encumbering the property, then when the property is sold the unassumed mortgage is included in the amount realized. 557 F.2d at 214.

[59] *Id.* at 214-16.

[60] The nonrecourse debt had been used by the taxpayers to increase their basis in the stock, thus allowing them to take sizable loss deductions against that basis. *Id.* at 215.

[61] *Id. See supra* note 42 and accompanying text.

[62] 577 F.2d at 215.

[63] 651 F.2d 1058 (5th Cir. 1981).

[64] *Id.* at 1063. *See supra* notes 1-12 and accompanying text for a discussion of the facts in this case and related decisions of the Tax Court and United States Supreme

sion,[65] the Fifth Circuit became the first court to recognize footnote thirty-seven of *Crane* as an exception to the treatment of nonrecourse debt as amount realized.[66] Thus, the Fifth Circuit dismissed the reliance of the Commissioner and the Tax Court on the tax benefit theory-double deduction language of *Crane*.[67] The court noted that any tax benefit derived from prior depreciation deductions was accounted for by the Internal Revenue Code through downward adjustments in basis,[68] and stated that to include those prior deductions in the amount realized would result in accounting for them two times in the same equation, thus taxing the depreciation deductions twice.[69] Instead, the Fifth Circuit asserted that the ruling in *Crane* was primarily justified on an economic benefit theory,[70] which the court noted was flawed in its premise.[71] Declining to extend *Crane* beyond its facts, the Fifth Circuit concluded that the fair market value limitation of footnote thirty-seven was applicable to the case at bar.[72]

Court.

[65] 651 F.2d at 1060. *See supra* notes 11-12.

[66] *See* Del Cotto, *supra* note 42, at 85-86. The court noted that footnote thirty-seven created an exception to the general holding in *Crane* concerning inclusion of nonrecourse debt in the amount realized upon disposition of encumbered property. 651 F.2d at 1060. *See supra* notes 38-42 and accompanying text.

While *Tufts* was on appeal before the Fifth Circuit, the Treasury Department formalized its position against footnote thirty-seven by promulgating Treas. Reg. § 1.1001-2, T.D. 7741, 1981-1 C.B. 430. The applicable section in this new regulation stated:

> (b) Effect of fair market value of security. The fair market value of the security at the time of sale or disposition is not relevant for purposes of determining under paragraph (a) of this section the amount of liabilities from which the taxpayer is discharged or treated as discharged. Thus, the fact that the fair market value of the property is less than the amount of the liabilities it secures does not prevent the full amount of those liabilities from being treated as money received from the sale or other disposition of the property.

Treas. Reg. § 1.1001-2(b), T.D. 7741, 1981-1 C.B. 430, 431.

[67] 651 F.2d at 1060-61. *See supra* note 42 and accompanying text.

[68] 651 F.2d at 1061. The court noted that adjustments to basis for depreciation were provided for in I.R.C. § 1016 (1976 & Supp. V 1981). 651 F.2d at 1061.

[69] 651 F.2d at 1061. The Fifth Circuit stated that the Internal Revenue Code already provided for recapture of prior deductions through I.R.C. § 1016 (1976 & Supp. V 1981), which required that basis be reduced by the amount of allowable depreciation regardless of whether it was taken. 651 F.2d at 1061 n.6.

[70] 651 F.2d at 1061. *See supra* note 39.

[71] 651 F.2d at 1062. The premise referred to was the statement in *Crane* that an owner of property encumbered by nonrecourse debt of an amount less than fair market value would treat the obligation as though it were recourse. *Id.* *See supra* note 40. The court noted that this reasoning was flawed because it would hold true only if the owner actually wanted to retain the property. 651 F.2d at 1062.

[72] 651 F.2d at 1063. In a footnote following its conclusion, the court stated that it

In the instant case, the Supreme Court reasoned that because no difference had been recognized between recourse and nonrecourse obligations in computing basis,[73] and since nothing in section 1001(b) of the Internal Revenue Code[74] or the Court's prior decisions required asymmetrical treatment of nonrecourse debt,[75] then when a taxpayer sold or disposed of property encumbered by nonrecourse obligations, the outstanding portion of the debt was a component of the amount realized on disposition.[76] The Court reasoned further that to limit the amount realized to the fair market value of the property would produce a tax loss for which there was no corresponding economic loss.[77] Therefore, the fair market value of the property disposed of was irrelevant in the computation of the amount realized.[78] In response to the taxpayers' alternative theory,[79] the Court determined that since the

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agreed with the taxpayers' position that I.R.C. § 752(c) (1976) limited the amount realized from the disposition of their partnership interest to the fair market value of the property it secured. 651 F.2d at 1063 n.8. The court noted that since I.R.C. § 752(c) is regarded as the codification of the *Crane* doctrine, then the Fifth Circuit's interpretation of *Crane* as limiting amount realized to the fair market value of the property disposed of resolves any prior conflict between I.R.C. § 752(c) and I.R.C. § 752(d) (1976). 651 F.2d at 1063 n.8. *See supra* note 10.

The Fifth Circuit further acknowledged that its holding was in direct conflict with the other circuits, but the court called attention to the narrow issue before it: whether the full amount of nonrecourse indebtedness was properly included in amount realized by the Tax Court. 651 F.2d at 1063 n.9. The Fifth Circuit noted that the crux of the problem was the ability of the taxpayers to manipulate their basis and adjusted basis through nonrecourse financing. The solution, the court reasoned, was not to equate the discharge of nonrecourse debt with the economic benefit of receiving cash, but rather to deal judicially or legislatively with the definition of basis and adjusted basis. The Fifth Circuit concluded that, unless Congress had provided for recapture, no relationship existed between amount realized, basis, and adjustments to basis. *Id.* at 1064 n.9.

[73] *Tufts*, 103 S. Ct. at 1832. The Court noted that when Congress enacted the "at risk" rules of I.R.C. § 465 (1976 & Supp. V 1981), it chose to exempt real estate transactions from its deduction limitation, thus allowing equal treatment to both recourse and nonrecourse obligations. 103 S. Ct. at 1832 n.7. Further, the Court noted that the Commissioner had chosen to treat nonrecourse and recourse debt the same. 103 S. Ct. at 1831-32.

[74] *See supra* note 5.

[75] 103 S. Ct. at 1834. The Court noted that *Crane* stood for the proposition that a nonrecourse loan should be treated as would a true (recourse) loan. 103 S. Ct. at 1834.

[76] *Id.*

[77] *Id.* The Court reasoned that the mortgagee of a nonrecourse loan was the one affected by decreases in the value of the property because only his interest remained at risk. *Id.* The mortgagee in *Tufts* was the Farm & Home Savings Association. *Id.* at 1828.

[78] *Id.* at 1836.

[79] The taxpayers argued that I.R.C. § 752(c) (1976) placed a fair market value limitation on the disposition of an encumbered partnership interest. 103 S. Ct. at 1834-35.

legislative history of section 752(c) of the Internal Revenue Code indicated it was directed solely to transactions between a partner and the partnership,[80] then the amount realized upon disposal of a partnership interest to third parties under section 752(d) was not limited to fair market value.[81]

The holding in the instant case succinctly ended thirty-six years of uncertainty and speculation arising from the Court's hypothetical observation in footnote thirty-seven of *Crane*.[82] By ruling in favor of the Commissioner, the Supreme Court in *Tufts* gave final judicial recognition to the symmetrical or functional relation that exists between the amount realized and basis sections of the Code.[83] To deny the symmetry, as did the Fifth Circuit in its opinion in *Tufts*,[84] is to ignore the economic realities of debt-financed transactions. The Supreme Court in *Tufts* recognized, as did the Third Circuit in *Millar*,[85] the certain absurdity that would exist if on the one hand taxpayers were allowed to compute depreciation based on the obligation's full value and on the other allowed to limit the amount realized to the security's fair market value upon disposition.[86] Indeed, permitting a taxpayer to take a tax loss in excess or in the absence of an actual economic loss[87] compelled

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See supra note 10.

[80] 103 S. Ct. at 1835-36. Citing H.R. REP. No. 1337, 83d Cong., 2d Sess. A236-A237, *reprinted in* 1954 U.S. CODE CONG. & AD. NEWS 4376, 4376-77 and S. REP. No. 1622, 83d Cong., 2d Sess. 405, *reprinted in* 1954 U.S. CODE CONG. & AD. NEWS 5047, 5047-48, the Court noted that the only reference to I.R.C. § 752(d) (1976) in the legislative report did not discuss the limitation, and in the discussion of I.R.C. § 752(c) (1976), the Court noted that it spoke only in the context of I.R.C. § 752(a) (1976) and I.R.C. § 752(b) (1976). 103 S. Ct. 1835-36.

For a discussion of I.R.C. § 752 (1976) and its legislative history, see Simmons, *Tufts v. Commissioner: Amount Realized Limited to Fair Market Value,* 15 U.C.D. L. REV. 577, 609-16 (1982).

[81] 103 S. Ct. at 1836. Justice O'Connor concurred with the opinion of the Court but noted that had it not been for the judicial precedence of the *Crane* decision, she would have favored the approach suggested by Professor Wayne G. Barnett as amicus. 103 S. Ct. at 1836. Professor Barnett argued that the disposition of encumbered property should be accounted for separately in two transactions: the first involving the cancellation of indebtness and the second the transfer of property. The Court noted, however, that it was not presented with the contours of the cancellation of indebtedness doctrine and offered no opinion on this view. *Id.* at 1833 n.11.

[82] *See supra* notes 41, 62, 70-72 and accompanying text.

[83] *See supra* notes 38, 73-75 and accompanying text.

[84] *See supra* note 72 (court noted that no relationship existed between amount realized, basis, and adjustments to basis).

[85] *See supra* note 46 and text accompanying notes 58-62.

[86] *See supra* note 42.

[87] *See supra* text accompanying notes 77-78.

the conclusion in the instant case. Furthermore, contrary to the reasoning of the Fifth Circuit, the inclusion by the Supreme Court in both *Crane*[88] and *Tufts*[89] of the outstanding portion of the nonrecourse debt in the amount realized does not result in double taxation.[90] In actuality, the taxpayers were merely required to restore to their income prior depreciation deductions taken to which they were not entitled.[91] Indeed, as in *Lutz*,[92] *Woodsam Associates, Inc.*,[93] and *Mendham*,[94] the *Tufts* approach simply recognizes that any gain that may result in debt-financed transactions cannot be determined until final disposition of the property. Further, the Court's interpretation of the fair market value limitation of section 752(c) of the Internal Revenue Code[95] as limiting only those transactions between partners is consistent with the Court's rejection of any limitation in transactions generally. It is submitted, then, in light of *Crane* and its progeny, and in consideration of the economic realities surrounding the accounting for debt-financed transactions, that the Supreme Court's dismissal of the fair market value limitation of footnote thirty-seven provides the only workable result for our present tax system.

Hugh E. Tanner

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[88] *See supra* notes 37-41 and accompanying text.
[89] *See supra* text accompanying note 76.
[90] *See supra* note 69 and accompanying text.
[91] *Id.*
[92] *See supra* notes 15-23.
[93] *See supra* note 23.
[94] *Id.*
[95] *See supra* text accompanying notes 79-80.

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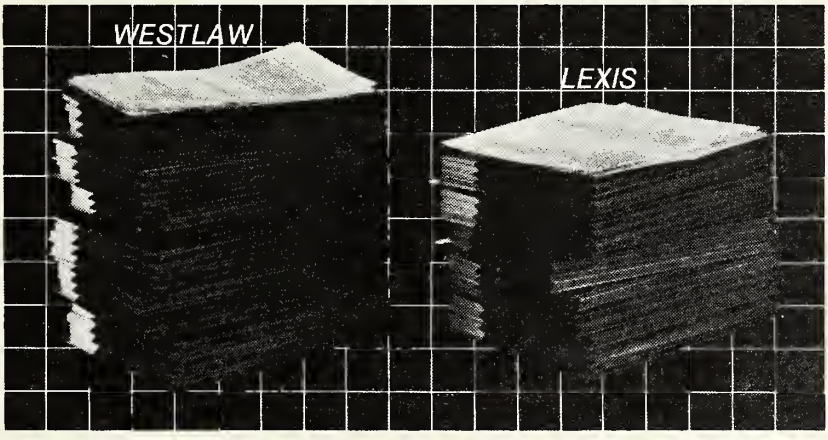

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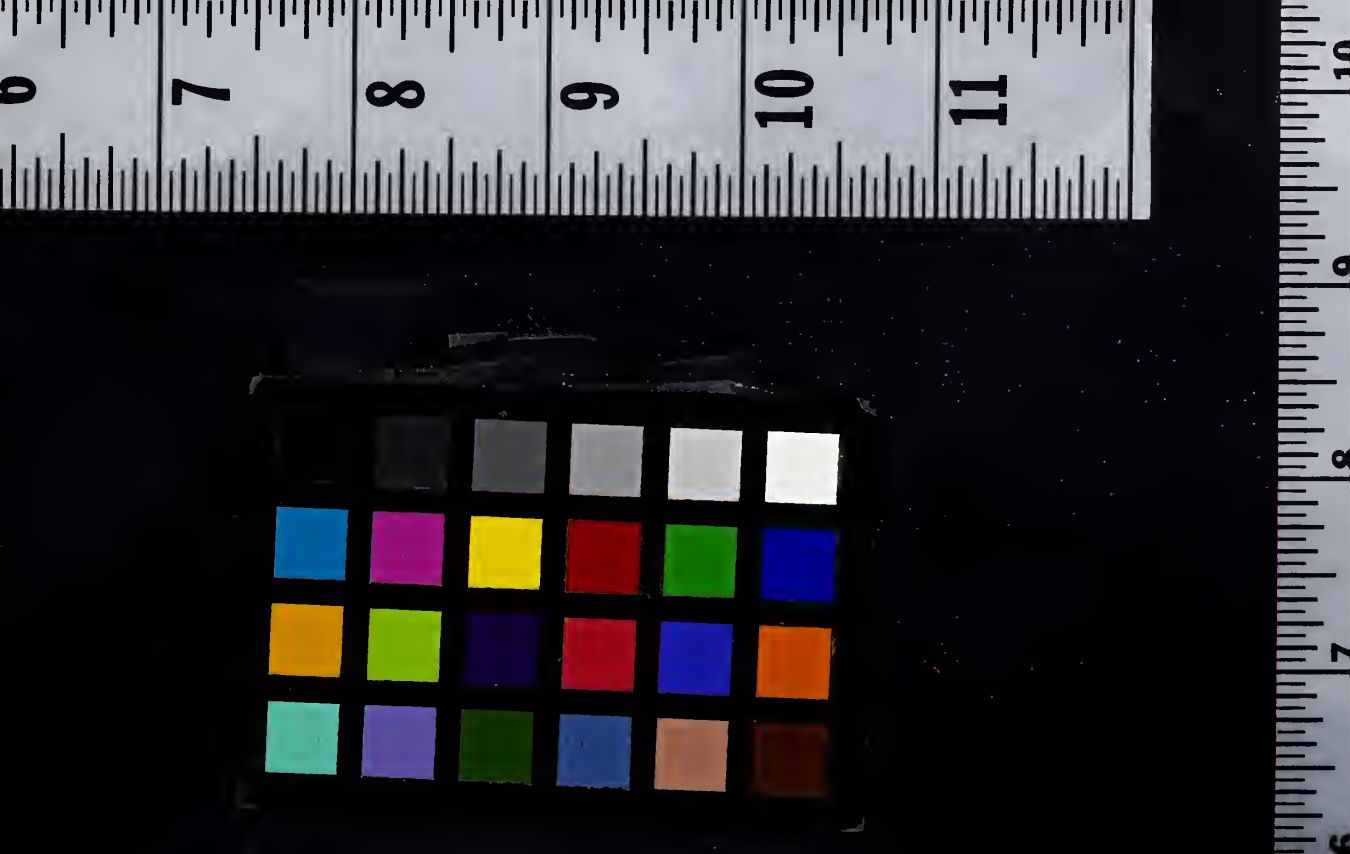

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